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No. 99-

IN THE

Supreme Court of the United States

VIDEO TRAX, INC.,

Petitioner,

v.

NATIONSBANK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. When a bank allows a customer's check to clear, and advances funds to cover the overdrawn check, is this an extension of credit?

II. Is the overdraft ("OD") fee charged by a bank when it clears a customer's overdrawn check a fee charged in connection with an extension of credit, and therefore interest under 12 U.S.C. § 85?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Video Trax, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	ix
Opinions Below	1
Statement of Basis for Jurisdiction	1
Statutes and Regulations at Issue	1
Statement of the Case	1
Reasons for Granting the Writ	10
I. When A Bank Allows A Customer's Check To Clear, And Advances Funds To Cover The Overdrawn Check, Is This An Extension Of Credit?	10
Analysis of *First Bank.*	16
Analysis of the *Nicholas* and *Beech* Opinions.	17

Contents

Page

II. Is The Overdraft ("OD") Fee Charged By A Bank When It Clears A Customer's Overdrawn Check, A Fee Charged In Connection With An Extension Of Credit And Therefore Interest Under 12 U.S.C. § 85 22

Conclusion 26

TABLE OF CITED AUTHORITIES

Page

Cases:

Am. Timber & Trading Co. v. First Nat'l Bank, 690 F.2d 781 (9th Cir. 1982) 14

Bank One, Columbus v. Mazaika, 680 A.2d 845 (Pa. 1996) 13

Beech v. Trust Mark National Bank, No. 97 CV 187 GR (S.D. Miss. Jan 13, 1998) .. 15, 16, 17, 18, 20, 21

Conner Air Lines, Inc. v. Aviation Credit Corp., 280 F.2d 895 (5th Cir. 1960) 13, 14

Cronkleton v. Hall, 66 F.2d 384 (8th Cir. 1933) 14

Delgosso v. Spang and Com., 903 F.2d 234 (3d Cir. 1990) 20

Dikeon v. Dikeon, 928 P.2d 1286 (Colo. 1996), *cert.den.*, 116 S. Ct. 2496 (1996) 13

First Bank v. Tony's Tortilla Factory, 877 S.W. 2d 285 (Tex. 1994) 15, 16, 17

Fisher v. First Nat'l Bank of Omaha, 548 F.2d 255 (8th Cir. 1977) 14

Gitlitz v. Compagnie Nationale Air France, 129 F.3d 554 (11th Cir. 1997) 11

Cited Authorities

Page

Greenwood Trust Co. v. Commonwealth of Mass., 971 F.2d 818 (1st Cir. 1992) 13, 14

In Re: Miller, 215 B.R. 970 (Bankr. E.D. Ky. 1997) 13

International Union, United Mine Workers v. Jim Walter Resources, 6 F.3d 722 (11th Cir. 1993) 11

Kenty v. Bank One, Columbus, N.A., 1992 WL 170605 (S.D. Ohio April 23, 1992) 14

McAdoo v. Union Nat'l. Bank, 535 F.2d 1050 (8th Cir. 1976) 14

Nelson v. Citibank, (S.D.) N.A., 794 F. Supp. 312 (D. Minn. 1992) 14

Nicolas v. Deposit & Guaranty National Bank, 182 F.R.D. 226 (S.D. Miss. 1998) 15, 16, 17, 18, 19, 20, 21

Northway Lane v. Hackley Union Nat'l Bank & Trust Co., 464 F.2d 855 (6th Cir. 1972) 14

Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414 (3d Cir. 1988) 20

Pentico v. Mad-Wayler, Inc., 964 S.W. 2d 708 (Tex.App. 1998) 13

Cited Authorities

Page

Schumacher v. Lawrence, 108 F.2d 576 (6th Cir. 1940) 14

Sims v. Union Planters Bank of Northeast Mississippi, N.A. 1997 WL 170309 (N.D. Miss. 1997) 21

Smiley v. CitiBank (S.D.) N.A., 517 U.S. 735, 116 S. Ct. 1730 (1996) 12, 13, 16, 17, 20

Sumner v. Michelin No. America, Inc., 966 F. Supp. 567 (M.D. Ala. 1997) 20

Swindell v. F.N.M.A., 409 S.E. 2d 892 (N.C. 1991) .. 13

Taylor v. Union Planters Bank of Southern Mississippi, 964 F. Supp. 112 (S.D.Miss. 1997) 21

Tikkanen v.CitiBank, N.A , 801 F. Supp. 270 (D.Minn. 1992) 12, 13

Watson v. First Union Nat'l Bank of South Carolina, 837 F. Supp. 146 (D.S.C. 1993) 13

Cited Authorities

Page

Statutes:

12 U.S.C. § 1291 10

15 U.S.C. § 85 ..... i, 1, 2, 13, 14, 17, 22, 25

15 U.S.C. § 86 ..... 1, 2, 13

15 U.S.C. § 1601, *et. seq.* 21

28 U.S.C. § 1254(1) 1

Other Authorities:

12 C.F.R. Part 226 21

12 C.F.R. § 7.4001 ..... 1, 12, 17, 22, 23, 25

12 C.F.R. § 7.4001(a) 22, 24

12 C.F.R. § 7.4002 ..... 1, 24

12 C.F.R. § 7.4002(c) 24, 25

Black's Law Dictionary 730 (5th Ed. 1979) 11, 12

Webster's 9th Collegiate Dictionary 630 (1989) ... 11, 12

TABLE OF APPENDICES

Page

Appendix A — Opinion Of Eleventh Circuit, *Video Trax, Inc. v. Nationsbank, N.a.*, 205 F.3d 1358 (11th Cir. 2000) Dated March 14, 2000 ..... 1a

Appendix B — Opinion Of District Court Incorporated By Eleventh Circuit, *Video Trax v. Nationsbank, N.A.*, 33 F. Supp. 2d 1041 (S.D. Fla. 1998) Dated December 10, 1998 ..... 3a

Appendix C — Opinion Of The District Court On Initial Motion To Dismiss Below *Video Trax v. Nationsbank*, N.A. No. 97-1586 (S.D.Fla., Filed Dec. 22, 1997) 46a

Appendix D — Text Of 12 U.S.C. § 85; 12 U.S.C. § 86; 12 C.F.R. § 7.4001 And 12 C.F.R. § 7.4002 ..... 59a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Video Trax, Inc. v. NationsBank, N.A.*, 205 F.3d 1358 (11th Cir. 2000). (App. A). The opinion of the district court is reported at *Video Trax, Inc. v. NationsBank, N.A.*, 33 F. Supp. 2d 1041 (S.D. Fla. 1998). (App. B). The order on the trial court's original motion to dismiss cited herein, is also cited as *Video Trax, Inc. v. NationsBank, N.A.*, No. 97-1586 (S.D. Fla., filed Dec. 22, 1997). (App. C).

STATEMENT OF BASIS FOR JURISDICTION

The judgment sought to be reviewed in this case was entered in the United States Circuit Court, Eleventh Circuit on March 14, 2000.

This Court has jurisdiction under 28 U.S.C. § 1254(1), to review the judgment of the Circuit Court of Appeals, Eleventh Circuit, on a writ of certiorari.

STATUTES AND REGULATIONS AT ISSUE

The statutes and regulations at issue are 15 U.S.C. §§ 85 and 86, and 12 C.F.R. §§ 7.4001 and 7.4002. These are set forth at App. D.

STATEMENT OF THE CASE

As evidenced in the record, an accurate summary of which is set forth below, both the Petititioner and Respondent in the trial court moved for summary judgment. In essence, Petitioner, Video Trax was asserting that when an overdraft fee was charged (after the bank admittedly made an extension of credit by allowing an overdrawn check to clear) this constituted a charge incurred in connection with an extension of credit.

Under this scenario, 15 U.S.C. §§ 85 and 86 provide a remedy for usury where the amount of the overdraft fee, plus additional interest also charged on this extension of credit, exceeded the usury cap. Despite the plethora of material facts (which the Eleventh Circuit Court of Appeals panel openly acknowledged at the time of oral argument), the District Court entered summary judgment against Video Trax, finding that the bank's *admitted* extension of credit was *not* an extension of credit, and therefore the overdraft charge could not have been made in connection with an extension of credit.

The District Court also found (as adopted by the Eleventh Circuit), among other things, that a flat rate fee is not within the generally understood definition of interest, despite the fact that cases all over the country have found to the contrary. Further, the court below found that the customer was properly assessed charges to discourage its behavior, despite the fact that the bank candidly admitted that it had a policy to encourage such behavior as a welcome source of income. Further, NationsBank had established secret, undisclosed lines of credit within customers' accounts, and was milking this as a motherlode of income. Rather than address the admitted issues of material fact, the Eleventh Circuit Court of Appeal simply affirmed the District Court ruling and expressly adopted it as its own. As a result, the current state of the case law resulting from the District Court's and Circuit Court of Appeals' opinions improperly applied the summary judgment standard and found that an admitted extension of credit was not an extension of credit, and therefore not subject to usury limitations. Given the class certification potentially involving millions of accounts and the nationwide application of this issue, this is a matter of paramount importance.

A summary of the material facts is set forth as follows (all factual references are supported in the record below):

In 1992, Video Trax opened an account at NationsBank's predecessor. Pursuant to Video Trax' depositor agreement with

NationsBank, Video Trax agreed in writing to pay overdraft type charges, or an "Overdraft Item Fee," when NationsBank would pay a check presented for payment that exceeded the collected balance in Video Trax' account.

The account agreement did *not* provide for a flat fee whenever a check written and presented for payment on Video Trax' account exceeded the account balance. To the contrary, the agreement specifically stated that NationsBank did not have to pay a check presented which exceeded the account balance, ". . . but we may pay it at our option and *charge you a fee*." Therefore, if NationsBank chose to do so, it would clear an overdrawn check as an extension of credit and at that point would charge a $27.00 Overdraft Item Fee ("OD" fee) in addition to charging additional interest on the overdrawn account. NationsBank admitted that the OD fee would be charged *after* there was a determination that an extension of credit was going to be made. If the bank "bounced" a check by *not* clearing it, it would charge a separately designated NSF fee. "Bouncing" a check represented a *denial* of credit. In reference to Video Trax' account, these extensions of credit averaged $6,000 on an annual basis, but resulted in over $18,000 in annual interest charges, including the OD fees — an over 300% interest rate. (App. B).

NationsBank's Vice President, Roland Rodriguez, testified that he created a flow chart showing the methodology by which a check is processed at NationsBank. This extremely useful guide is found in the record below. It distinctly reflects that a credit review and credit determination is made *prior* to the OD fee being assessed against the customer's account. Rodriguez indicated that once it is determined that there are not sufficient funds in an account to cover a check, the check goes (if not immediately determined to be an NSF "return- and-charge" item) into an automated "matrix" system. Rodriguez testified that "*. . .[t]he matrix is an automatic feature that the bank employs to determine if the item should be paid or not, or offer*

advice on whether the item should be paid or not." In fact, the matrix is a credit-scoring model that analyzes a number of factors to decide whether to extend credit to the customer. If the check is paid, then the ". . . overdraft fee is assessed." In other words, the OD fee is assessed in connection with a decision to extend credit. Rodriguez admitted that he had seen some of Nations-Bank's internal documentation which characterized the payment of overdrafts as an "*unofficial line of credit.*"

Another senior NationsBank officer, David Duvall, also shed additional light on the overall policy whereby NationsBank substantially increased the scope of its income through this type of charge. Duvall acknowledged familiarity with a report from the Earnings Performance Group ("EPG"), a report generated for NationsBank, which details NationsBank's policy to increase the number of insufficient fund checks allowed to clear in order to dramatically increase the fee income from such charges.

Dispositive of the issue of whether NationsBank considers clearing an OD check as an extension of credit, the EPG report explicitly references this allowance of a greater number of checks to clear and the use of the automated credit scoring decision matrix or "pay-to"[1] limits as constituting an "*unofficial line of credit*" albeit *undisclosed* to the customer.

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1. This secret "unofficial line of credit" and the "pay-to" limits, were explained by Duvall as follows:

A. In that circumstance, I believe they would, yes, sir.

Q. But under the matrix, isn't there under the scoring system for certain accounts, there is an automatic allowance of a certain overdraft?

A. There is an amount that a customer would be allowed to be overdrawn in a particular given time, yes, sir.

(Cont'd)

(Cont'd)

Q. Does that require any type of pre-approval of an overdraft line?

A. No, sir, it does not.

Q. When a relationship officer, and that would be whoever is handling or assigned that account, when they make a manual entry to allow up to a certain limit, is that something that's allowed under the matrix system?

A. Again, it's totally outside of the matrix.

Q. Well, how does it work?

. . .

A. A hypothetical customer comes into the bank, and the relationship officer feels that this is a large, significant account, and they want to enter some sort of overdraft limit on their account.

Q. How would that be implemented?

A. They have a "pay-to" limit that they would allow that would be entered into the DDA [direct deposit account] system, that would say that this customer can be overdrawn up to this limit.

Q. Is that done when the account is first opened?

A. It could be done anytime during the relationship.

. . .

Q. Would this, in essence, override whatever the matrix scoring is?

A. Yes, sir, it does.

(Cont'd)

Duvall then made a stunning admission that it does not cost NationsBank any more to process checks within that "pay-to" limit than checks that are covered by funds in the customer's account. [2]

Duvall also testified that accounts with a "pay-to" limit (the "unofficial line of credit") are processed just like regular

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(Cont'd)

Q. When an overdraft "pay-to" limit is set on an account, is the customer notified that this is put in place?

A. I am not sure if they are.

Q. If a customer has that "pay-to" limit on their account, isn't it correct that a check drawn on their account that exceeds collected funds will simply process through up to that "pay-to" limit just like any other check?

A. Yes, sir, it is.

Q. If this check, in fact, clears under the "pay-to" limit, in other words, beyond the limit in the account and up to that "pay-to" limit, is an overdraft fee, what's designated as an OD, overdraft fee charged to the account?

A. There would be service charges, yes, sir.

2. Q. If a customer has a "pay-to" limit, just in the hypothetical, up to $10,000 over the balance in their account, would all checks presented up to that limit process through as regular checks subject only to being hit with the overdraft charge?

A. In that circumstance, I believe they would, yes, sir.

Q. Do you know in the scope of the way in which NationsBank processes checks, does it cost NationsBank any more on a processing basis to process those checks as opposed to the ones that are within the collected balance limit?

A. No, sir, I am not aware of any.

checks with no additional work required of the bank. Duvall also explained the process which evidences that the OD fee, as opposed to the NSF fee, is imposed in connection with this admitted extension of credit.[3]

Moreover, NationsBank resolved any lingering doubt as to what it considers to be extensions of credit as NationsBank's own commercial lending and credit policy manual excerpts, under the heading "Overdrafts" indicates that overdrafts are to be viewed as "*extensions of credit*" and must be properly documented and approved as such.

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3. Q. According to this . . . , is it correct that after a determination is made to pay an item, if it follows the "yes" rack to the right after it says "item paid," that *this is the point in time in the process that the overdraft fee is assessed* ?

   A. *Yes, sir, it is.*

   Q. Then, if you follow it to the left after where it says "item paid" and it says "no" is it correct that that is the point in time — it is called OD on here, but the way NationsBank deals with it, that is when the NSF fee is assessed?

   A. Yes, sir.

   Q. Would it be more accurate in terms of this chart, rather than that being referred to on the left, where it says "OD fee is assessed" on the "no" track, that that should actually be an NSF fee?

   A. Yes, sir.

   Q. To use NationsBank's nomenclature?

   A. Yes, sir, it is.

Further, Duvall made the following admission:

Q. Is an overdraft fee, what is called an overdraft fee by NationsBank, is that only charged in connection with either an overdraft or a DAU, drawn against uncollected funds, is that the only circumstance in which. . . .?

A. That's the only situation I am aware of, yes, sir.

In short, Duvall admitted that the OD fee is only charged in connection with an extension of credit. Duvall further indicated that there are no known circumstances where an OD is not an extension of credit.[4]

There is no doubt as to the bank's admission:

Q. ". . . if the bank clears it, they are, in essence, extending credit to the customer, aren't they?

A: If the bank clears it, the customer does, indeed, have the bank's money and we do expect them to repay it, yes."

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4. Q. Are you aware of any circumstances in which an overdraft is not an extension of credit?

A. In this light, no, sir.

Q. Let me show you what's produced at page 484, entitled 'Commercial Purpose Credit Approval Authority, August 1, 1996.' Are you familiar with this document?

A. I have seen this, yes, sir.

Q. It says, 'Overdrafts of any type represent an *unsecured extension of credit*, and deserve the same examination and scrutiny.' Are you aware of that as a policy of NationsBank?

A. Yes, sir.

Notwithstanding NationsBank's assertion below that NSF and OD charges are eventually aggregated for accounting purposes and the trial court's equating of the two, Duvall reinforced VideoTrax' position that these are in fact separately designated fees.[5]

Duvall admitted in his deposition that by honoring checks and allowing checks to clear on uncollected funds, the bank is able to retain more customers as opposed to the bank undertaking the action of bouncing every check. This was considered a customer service to increase loyalty to NationsBank.

The unrebutted testimony of banking expert Gene Cooney, based upon his review of NationsBank's internal documents, established that NationsBank's processing of ODs is an extension of credit and that the OD fee is charged in connection with that extension of credit. Mr. Cooney explained that the entire methodology utilized by NationsBank in assessing OD fees makes it clear that these charges constitute a separate and independent fee, quite different and distinct from an NSF fee. Furthermore, this methodology, as set forth by Cooney, is part of a scheme utilized by NationsBank, which includes the allowance of an undisclosed "unofficial" line of credit, establishment of a "highest-to-lowest" priority of posting methodology and a planned increase in the allowance of the number of checks allowed to clear. All of those components are designed, in total, to create a significant source of income for NationsBank, rather than to discourage the use of these

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5. Q. *Is there some sort of a general entry made that identifies the fee and then it subsequently is relabeled either NSF or OD*? In other words, is a general fee called a processing fee or something of that nomenclature posted to the account, and then it gets relabeled for identification purposes?

   A. *No, sir. An item, when it's scored, it's either an OD or an NSF item.*". (Emphasis supplied).

processes, as NationsBank contends. Furthermore, according to Cooney, through the use of technology, a credit-scoring decision is made by an automated system to clear a check under an "unofficial line of credit."

In summary, the admitted facts conclusively established the existence of an "*unofficial line of credit*" and the assessment of OD fees in connection therewith.

The basis for federal jurisdiction in the Court of Appeals in the first instance was pursuant to 12 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I. WHEN A BANK ALLOWS A CUSTOMER'S CHECK TO CLEAR, AND ADVANCES FUNDS TO COVER THE OVERDRAWN CHECK, IS THIS AN EXTENSION OF CREDIT?

A loan is clearly an extension of credit. As a result of the opinion below, the Eleventh Circuit is saying that when a bank lets you use their money, under a written agreement to repay, that is not an extension of credit. This was the finding, despite NationsBank's admission, in their testimony and their own bank manuals, that this was an extension of credit. The Eleventh Circuit, in adopting the District Court's opinion, created law directly contradictory to prior United States Supreme Court rulings and other Circuit Courts of Appeal and District Court decisions.

Factually, there is no dispute that Video Trax created a record to support its claim. There are, as set forth in the statement of facts, a number of facts indicating that NationsBank called the act of allowing a check drawn on insufficient funds to clear an unsecured extension of credit. It is in their internal manuals, their bank consultants' report, and in depositions.

Further, the trial court, in its initial ruling on a motion to dismiss, also called it an extension of credit; "NationsBank assumed the role of creditor by honoring OD checks . . ." (App. C, at p. 53a). The trial court in its earlier ruling, gave NationsBank's argument to the contrary "short shrift." (App. C, at 53a). Notwithstanding the District Court's earlier ruling on the motion to dismiss, the District Court's summary judgment ruling, (explicitly incorporated in the Eleventh Circuit's ruling), said that when money is loaned, and the bank becomes a creditor, with the account holder a debtor, this is not an extension of credit.

Given the fact that the trial court was ruling on summary judgment, where the facts should be taken in the light most favorable to the plaintiff;[6] and that the Eleventh Circuit was supposed to have conducted a *de novo* review applying the same standard[7], the result below was not justified. Not only were there material issues of fact, but the undisputed facts conclusively established that there was an extension of credit undertaken, *by NationsBank's own admissions.*

The underlying fallacy of the lower court's ruling is found in the District Court's opinion at 33 F. Supp. 2d at 1050, (App. B). At that point, the Court found that in the absence of a clear expression as to what constituted "interest," that it would have to apply the ordinary meaning. Rather than look at a number of applicable cases set forth below, the Court merely applied one definition under Black's Law Dictionary 730 (5th Ed. 1979) to the effect that an "interest rate" would be a ". . . percentage of an amount of money which is paid for its use for a specified time." Further, the Court applied a mere dictionary definition under Webster's 9th Collegiate Dictionary

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6. *Gitlitz v. Compagnie Nationale Air France*, 129 F.3d 554, 556-557 (11th Cir. 1997).

7. *International Union, United Mine Workers v. Jim Walter Resources*, 6 F.3d 722, 724 (11th Cir. 1993).

630 (1989). There, "interest" was defined as ". . . a charge for borrowed money[,] generally a percentage of the amount borrowed." The District Court further held that "the plain and ordinary meaning of "interest" or "interest rate" does not include OD fees, NSF fees, and similar contingent or default charges." (App. B).

By making a fundamental error on this basic issue, the courts below set the framework for many other errors made in the case. The lower court's attempt to assert that interest is to be defined solely in terms of a percentage of the loan or advance, or as an amount tied to the time the funds are advanced is unavailing. Certainly, this may be one definition, but it is not the only one. As evidence of the fallacy of the lower court's reasoning, one need only examine the source the lower court used as its underpinning, Black's Law Dictionary. Notwithstanding the fact that interest charges are defined by federal law at 12 C.F.R. § 7.4001 as including "over-limit fees," the court relied upon Black's Law Dictionary definition of "interest rate." "Interest rate" is, in fact, defined as the ". . . percentage of an amount of money which is paid for its use for a specified time." Black's Law Dictionary 730 (5th Ed. 1979). However, this is just a mathematical truism, and not a statement as to what is included in "interest." Black's, at p. 729, defines "gross interest" as ". . . the total interest paid by the borrower, which includes administrative costs and expenses to lender." This obvious difference, put in context, reveals the invalidity of the trial court's reasoning.

In the United States Supreme Court case of *Smiley v. CitiBank (S.D.) N.A.*, 517 U.S. 735, 116 S. Ct. 1730 (1996), this court clearly recognized that over limit and overdraft fees, which may constitute flat fees, do constitute interest for purposes of 12 U.S.C. § 85. A recent series of cases, in addition to *Smiley,* have also found that over limit fees constitute interest. For example, in *Tikkanen v.CitiBank, N.A* , 801 F. Supp. 270 (D.Minn. 1992), the court held that over limit fees, in addition

to regular interest charges imposed on customers, are interest for purposes of applying 12 U.S.C. §§ 85 and 86. The *Tikkanen* court rejected the bank's argument that the definition of interest under § 85 was limited to only periodic interest charges. *Id.* at 276. Similarly, in *Watson v. First Union Nat'l Bank of South Carolina*, 837 F. Supp. 146 (D.S.C. 1993), the court held that over limit fees were interest for purposes of the National Bank Act.

To follow the lower court's reasoning through to its conclusion, would essentially vitiate a whole line of decisions by courts throughout the country which have broadly recognized that flat fees, like periodic interest rates, are interest as well.[8]

Further, in the context of the National Bank Act and federal regulations interpreting interest charges, it has been found that charges for extensions of credit, even in an over limit, late charge or default renewal posture, are all calculable interest charges as well. *In Re: Miller*, 215 B.R. 970 (Bankr. E.D. Ky. 1997).

The courts below simply took a superficial look at the principle in general, without examining the actual facts and context. A determination as to whether such charges, including overdraft charges, are in fact interest, requires a court to determine the function of the charge which is not controlled by the self-serving label used by a bank. *Conner Air Lines, Inc. v. Aviation Credit Corp.*, 280 F.2d 895 (5th Cir. 1960). Indeed, where there is an intent on the part of the lender to make a loan

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8. *See Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818 (1st Cir. 1992); *Bank One, Columbus v. Mazaika*, 680 A.2d 845 (Pa. 1996) (applying federal law, citing *Smiley* with approval); *Dikeon v. Dikeon*, 928 P.2d 1286 (Colo. 1996), *cert.den.*, 116 S. Ct. 2496 (1996); *Swindell v. F.N.M.A.*, 409 S.E. 2d 892 (N.C. 1991) (late fees are interest for usury purposes, regardless of contingent nature; savings clause does not save it). *Pentico v. Mad-Wayler, Inc.*, 964 S.W. 2d 708 (Tex.App. 1998); *Tikkanen, supra* (late charges and over limit fees are interest, even if these flat charges are in the customers' control.)

or extension of credit for a greater profit than is permitted by law, the transaction is tainted with usury, even though it is cast in a form which was designed to give it a cloak of apparent legality. *Id.* at 899.

For example, in *Conner*, the court held that if a borrower promises or is otherwise required to pay a bonus or other consideration as an inducement to the lender to make a loan, such added costs will be considered interest and can render a loan usurious. *Id.* at 899. A lender will not be allowed to impose miscellaneous fees or service charges on the front end of a loan when that sum, added to the interest charged, exceeds the maximum legal rate of interest allowable. *Id.* at 899.

In analyzing what constitutes the term "interest" for purposes of making a usury determination, the courts have had little trouble in construing interest to encompass a variety of lender-imposed fees which have been couched in terms other than a numerically stated percentage interest rate.[9]

As can be seen from the case law cited herein, including United States Supreme Court precedent, the Eleventh's Circuit's

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9. *Greenwood, supra,* (finding that interest under 12 U.S.C. § 85 could not be defined narrowly to include only period interest charges, but included flat fees on delinquent accounts as well); *Am. Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 781, 787-88 (9th Cir. 1982) (compensating balance requirement is interest); *Fisher v. First Nat'l Bank of Omaha*, 548 F.2d 255, 258-61 (8th Cir. 1977) (fee for cash advance is interest); *McAdoo v. Union Nat'l. Bank*, 535 F.2d 1050, 1056 (8th Cir. 1976) (compensating balance requirement is interest); *Northway Lane v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855, 863 (6th Cir. 1972) (closing costs are interest); *Schumacher v. Lawrence*, 108 F.2d 576, 577 (6th Cir. 1940) (closing costs are interest); *Cronkleton v. Hall*, 66 F.2d 384, 387 (8th Cir. 1933) (bonus or commission paid to lender is interest); *Nelson v. Citibank, (S.D.) N.A.*, 794 F. Supp. 312, 318 (D. Minn. 1992) (late fees are interest); *Kenty v. Bank One, Columbus, N.A.*, 1992 WL 170605 (S.D. Ohio April 23, 1992) (excessive and unauthorized insurance premiums are interest).

decision incorporating the District Court opinion, contradicts a long legal history. This is an important issue which effects many accounts. A class certification was granted in the instant case. On Video Trax' account alone, an average credit advance of $6,000 annually caused the customer to incur approximately $18,000 in annual bank charges.

The tenor of the District Court judge's opinions seemed to be that it was appropriate to punish the borrower for their bad acts in issuing checks in excess of the amounts available in their account. However, the usury laws are designed to protect those who show that they are unable to handle their own finances. It helps those who cannot help themselves.

The courts below also ignored the fact that the bank did not have to clear the checks. Instead, they blamed the borrower. The bank did not have to extend credit, it could have bounced every check, and hit the customer with an NSF fee. However, as originally pointed out by the District Court in its ruling on the motion to dismiss, when the bank chose to extend credit, and therefore became a creditor, that carries with it the burdens of the usury prescriptions.

A compounding of the error was made by the courts below when they relied on distinguishable cases decided under Texas law, and two Mississippi District Court cases adopting that Texas case as reasoning. However, controlling federal law under the National Bank Act is what controls as to whether the imposition of an overdraft item fee is interest.

The inapplicability of the cases cited by the District Court, *First Bank v. Tony's Tortilla Factory*, 877 S.W. 2d 285 (Tex. 1994); *Nicolas v. Deposit & Guaranty National Bank*, 182 F.R.D. 226 (S.D. Miss. 1998); and *Beech v. Trust Mark National Bank*, No. 97 CV 187 GR (S.D. Miss. Jan 13, 1998), is explained below.

In essence, the courts used *First Bank*, *Nicolas*, and *Beech* as if these were the only reported judicial opinions in the country to address the issue of what are overdraft charges or interest. This position simply ignores the impact of *Smiley* and its progeny, cases decided *after First Bank*. *Smiley*, a United States Supreme Court case, is controlling federal law and trumps the idiosyncratic law of one isolated state in an earlier case not involving the National Bank Act. As the lower court's analytical underpinning to its summary judgment rulings, and the appeal from same, relied upon inapplicable and distinguishable cases, a detailed analysis of these cases is necessary.

Analysis of *First Bank*.

First Bank is factually and legally distinguishable. In *First Bank*, it was ". . . *undisputed* that each 'NSF' fee was assessed as a processing fee for the *additional work* required in connection with handling a bad check" (emphasis supplied), 877 S.W.2d at 286.

By contrast, in this case, there is no record evidence supporting the bank's contention that the OD fee was assessed as a processing fee for any *additional work* required in connection with the handling of a bad check. To the contrary, NationsBank admitted that there was *no additional cost* in processing an OD check in light of the automated "pay-to" limits which NationsBank concedes constituted an "unofficial" line of credit. The charging of the OD fee was in connection with an admitted extension of credit when NationsBank allowed a customer to overdraw their account. It was not called an OD fee until after a decision was made to honor it (i.e. extend credit).

In short, when the Texas court rendered its decision in *First Bank*, it was dealing with materially different facts that were stipulated to amongst the parties. The court in *First Bank* had no choice but to rule, as a matter of Texas law, that the "NSF" fee in that case was not interest, based on this materially different

set of facts. Because of this material variance of facts, the trial court improperly relied upon *First Bank* to conclude that the OD fees in this case are not interest, but a processing fee.

However, after *First Bank* was decided, this court in *Smiley* approved the Comptroller of the Currency's definition of the term interest as codified in 12 C.F.R. § 7.4001. Section 7.4001 expressly provides that NSF and over-limit fees constitute interest when charged in connection with an extension of credit. There were no other federal cases purporting to contradict this position that overdraft and NSF fees constitute interest under 12 U.S.C. § 85, until the recent opinions cited by the trial court of *Nicolas* and *Beech*. These two cases were decided on the same day by the same Mississippi District Court Judge.

Analysis of the *Nicholas* and *Beech* Opinions.

A careful review of the proof offered by the plaintiffs in the *Nicolas* and *Beech* cases, reveals that the Mississippi plaintiffs did not attempt to proffer the type of evidence which was uncovered by Video Trax in this case. In those actions, *the Mississippi plaintiffs did not have the opposing summary judgment affiant admitting in deposition, as Mr. Duvall did, that the fee at issue was assessed in connection with an extension of credit.* In *Nicolas* and *Beech*, the court in Mississippi was confronted with depositors who, by virtue of their account agreements, were subject to a singular uniform processing fee which was imposed by the defendant bank upon the presentation of a check on an account which contained insufficient funds. In other words, the fee was imposed right up front, and did not take a dual track, as in the instant case, where the OD fee would be charged to the account holder only after a credit determination was made.

Also distinguishing the Mississippi cases from the instant action was that the Mississippi plaintiffs did not attempt to establish the functional distinction in the actual process of

assessing OD fees, versus those involved in assessing NSF fees. The Mississippi plaintiffs *did not show* that there was an express arrangement whereby an automated credit-scoring model or a "pay-to" limit was established so that a customer had an "unofficial" line of credit. The Mississippi plaintiffs *did not show* a customer agreement that provided for the assessment of the fee only *after* the determination to pay the OD, and therefore after an extension of credit was made. The Mississippi plaintiffs *did not show* a systematic bank-wide effort to increase income directly through the imposition of OD fees. The Mississippi plaintiffs *did not show* that a unique automated system was used which posted the OD fee against the customer's account only *after* a credit determination had been made. The Mississippi plaintiffs *did not show* internal credit manuals, consultant studies, and other in-house bank documents admitting that the OD fee was assessed in connection with an extension of credit. In sum, the Mississippi plaintiffs *did not show* the broad array of factual evidence presented in this case to the court below. Therefore, this Court should not hold against Video Trax herein, the failure of the Plaintiffs in *Nicolas* and *Beech* to come forward with any evidence to support their claim.

Also distinguishing this case from the *Nicolas* case, the agreement in *Nicolas* provided for a uniform OD and NSF fee as follows:

> *Any time your account* (including any available deposit or credit account approved to provide overdraft protection) *does not contain sufficient funds* to pay checks, drafts or other debits presented to the bank for payment, *the bank will charge a fee to your account for each item presented, even if the bank does not pay those items.* You agree to pay the bank's current fees for non-sufficient funds processing as provided in the personal accounts disclosure for your account, and agree to deposit

> sufficient funds to cover any overdraft and unpaid fees upon notice of the overdraft.

Nicolas, at 228 (emphasis supplied).

However, the account agreement at issue in the instant case describes a quite different scenario than a mere uniform processing fee upon presentation of any check drawn on insufficient funds. In the instant action, the account agreement states:

> 7. Overdrafts. We are not obligated to pay an item presented if your account does not contain sufficient collected funds, *but we may pay it at our option and charge you a fee.*

(emphasis supplied).

In other words, contrary to the uniform up-front processing fee at issue in the Mississippi cases, in this case, NationsBank does not have to clear a customer's check, but once it does, and thereby extends credit, it may then "charge you a fee." Accordingly, the OD fee charged by NationsBank is unequivocally a fee imposed in connection with an extension of credit, and thus, interest, as a matter of law.

What was presumed in *Nicolas* — that the NSF fee was not imposed in connection with an extension of credit, is virtually the opposite of the facts *admitted* to by NationsBank. The Court in *Nicolas* pointed out that ". . . the rights of the parties are governed by the depository agreement which expressly provides that the NSF fee would be charged without regard to whether a check is paid on an overdrawn account." *Nicolas*, at 233. That is simply not the case in the instant action since the terminology in the NationsBank account agreement, and NationsBank's actual practice requires that the credit determination would be made and only then would the OD fee be charged.

Nicolas and *Beech* are also factually distinguishable in that there was no challenge by the account holders in those cases to the defendant bank's assertion that there was a cost incurred for the purported "processing" of NSF checks. Here, the factual scenario is quite different. As the District Court below correctly pointed out in its Order Denying the Defendant's Motion to Dismiss, in order to take the OD fee out of the definition of interest, as required by *Smiley*, where it is in connection with an extension of credit, NationsBank would have to prove that it was for some additional, separate and independent service. (App. C). NationsBank made absolutely no attempt to do so in this case. To the contrary, NationsBank could identify no additional costs in connection with processing such OD checks.

NationsBank's sworn assertions in discovery, including depositions of its own officers, precluded the bank from coming forward with cost or expense data to justify the charging of the $27.00 "Overdraft Item Fee."[10]

If a check takes the track where it is going to be paid under NationsBank's automated system despite being drawn on insufficient funds, it is, according to NationsBank's senior officer David Duvall, not a situation where it costs NationsBank any more money to process than an ordinary check. Since the OD fee is imposed *after* the automated credit determination is made, this fee obviously cannot be for the additional cost of processing that item since, as NationsBank admits, there is none. Instead, it is a fee charged in connection with an extension of

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10. *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3d Cir. 1988), (holding that judicial estoppel applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted); *Delgosso v. Spang and Com.*, 903 F.2d 234 (3d Cir. 1990); *Sumner v. Michelin No. America, Inc.*, 966 F. Supp. 567 (M.D. Ala. 1997) (holding that the doctrine of judicial estoppel is applied to the calculated assertion of divergent sworn positions and is designed to prevent parties from making a mockery of justice by taking inconsistent positions).

credit in order to generate income for NationsBank. As a source of income derived from the "unofficial" line of credit set up by NationsBank, it is interest. It really is that simple.

In addition to the dispositive factual distinctions between the facts in the instant case, and those in *Nicolas* and *Beech*, the Mississippi court's rationale wrongly utilized an analysis of the Truth-in-Lending Act. As a result, the Mississippi court applied federal interpretations of interest for purposes of determining usury too narrowly.

The Mississippi court initially looked at the provisions of the Truth-in-Lending Act, under 15 U.S.C. § 1601, *et. seq.* ("the Truth-in-Lending Act") and the interpretive regulations under Regulation Z, 12 C.F.R. Part 226. The Truth-in-Lending Act and the requirements of Regulation Z deal with definitions to determine what constitutes a finance charge, *strictly for disclosure purposes.* The Truth-in-Lending Act and Regulation Z are *not* usury statutes. Therefore, the holding by the Mississippi court, which found that overdraft charges would not constitute "finance charges," unless the imposition of the charges were previously agreed upon in writing, does not mean in any way, shape or form that simply because they are not "finance charges" *for disclosure purposes*, that they are not "interest" *for usury purposes.* The Mississippi Court and the lower courts in the instant case were comparing apples to oranges.

Furthermore, the Mississippi court relied upon inapplicable Truth-in-Lending cases. *Taylor v. Union Planters Bank of Southern Mississippi*, 964 F. Supp. 112 (S.D.Miss. 1997), and *Sims v. Union Planters Bank of Northeast Mississippi, N.A.* 1997 WL 170309 (N.D. Miss. 1997). The plaintiff/depositor in those cases conceded that the overdraft fees were not finance charges. Such a concession is not present here.

II. IS THE OVERDRAFT ("OD") FEE CHARGED BY A BANK WHEN IT CLEARS A CUSTOMER'S OVERDRAWN CHECK, A FEE CHARGED IN CONNECTION WITH AN EXTENSION OF CREDIT AND THEREFORE INTEREST UNDER 12 U.S.C. § 85?

The issue here is factually uncontradicted. The deponents Duvall and Rodriguez clearly established, as recognized by the Eleventh Circuit at oral argument, that there are certainly material facts in favor of Video Trax. NationsBank had a secret credit line set up on accounts as a huge source of revenue. They used this "unofficial" credit line to increase the number of overdraft checks, not to discourage them. Further, this was a motherlode of pure profit, since it was, once again, uncontradicted, that there was *no additional* cost to clear an overdraft check. Therefore, the fee was clearly assessed in connection with the extension of credit.

Under 12 C.F.R. § 7.4001, a fee will be considered interest where it is imposed in connection with an extension of credit. The courts below missed a very significant, determinative point. 12 C.F.R. § 7.4001(a) specifically references NSF and over-limit fees as being potential items of interest if imposed in connection with an extension of credit, or ". . . making available a line of credit . . ." The court below made the improper blanket interpretation that this was intended to cover certain fees that a national bank charges that arise out of its lending relationship with a customer, and not service fees arising out of its deposit relationship with a customer.

This begs a fundamental question. What could the Comptroller of the Currency, in its rule-making posture, have been referring to when it referred to "over limit" fees within the context of 12 C.F.R. § 7.4001(a)? This type of charge could only arise in the context of a deposit relationship, which also becomes a *lending relationship* when a bank extends credit by allowing an OD check to clear when there are insufficient funds

in the customer's account to cover the check. The lower court was concerned that in a deposit relationship the bank is the debtor and the depositor is the creditor. However, the courts failed to note that those roles reversed themselves when an OD check is paid and the bank becomes the creditor, and the depositor becomes a debtor.

The OD fees in this case, which were in fact charged in connection with an admitted extension of credit can arise in the context of a deposit relationship, as the lower court correctly noted, in its earlier order denying the defendant's motion to dismiss (App. C, at 53a).

> . . . NationsBank assumed the role of creditor by honoring overdraft checks, even if, as it contends, defendant was not obligated to honor each and every overdraft check. More importantly, taking plaintiff's allegations as true, defendant imposed a separate fee on its depositors when it honored an overdraft check than when it did not, ***and this demonstrates a connection between the fee charged and the extension of credit.***

(Emphasis supplied).

If an "official" OD protection arrangement (i.e. a line of credit) had been established by NationsBank, and an OD or some other form of over-limit fee were imposed every time this "official" OD line of credit was accessed, this Court surely would have had no problem declaring that the OD fee will be considered an interest charge in connection with an extension of credit, as required under 12 C.F.R. § 7.4001. There is no legal or logical distinction between the foregoing scenario and the OD fee charged every time Video Trax accessed its "unofficial" line of credit at NationsBank. Rendered down to its essentials, whether the extension of credit granted by

NationsBank is called an "official" line of credit or an "unofficial" line of credit, it is, in either event, a line of credit.

Under 12 C.F.R. § 7.4001(a), an NSF or over-limit fee is interest if imposed in connection with an extension of credit or making available a line of credit. NationsBank, and the courts below, attempted to hang their hat on the language of 12 C.F.R. § 7.4002 to avoid the applicability of 12 C.F.R. § 7.4001(a). 12 C.F.R. § 7.4002, a regulation which allows the establishment of non-interest charges and fees, is not applicable in the present context of an OD fee charged in connection with an admitted extension of credit. The rationale utilized by the court below in applying 12 C.F.R. § 7.4002 begs the ultimate threshold question in the entire case. Was the OD fee "connected with credit extension or availability"? 12 C.F.R. § 7.4001(a). If it was, 12 C.F.R. § 7.4002(c) must apply:

> (c) Interest. Charges and fees that are "interest" within the meaning of 12 U.S.C. § 85 are governed by § 7.4001, and not by this section.

The lower court's rationale in attempting to improperly fit the OD fee under 12 C.F.R. § 7.4002 is also found in the District Court opinion adopted by the Eleventh Circuit (App. B) The lower court found that NationsBank's OD fees substantially satisfy the reasonableness factors required under 12 C.F.R. § 7.4002. However, the Court cites no basis in law or fact for this conclusory finding. It is inconceivable as to how this $27.00 OD fee could satisfy the requirements of 12 C.F.R. § 7.4002 with the admitted testimony by NationsBank's own personnel that there was no additional cost. The deponents admitted that the clearing of more overdraft checks was an effort to maximize income, and that the shifting of the process over to an automated system to treat OD checks within the "pay-to limit" the same as regular checks, thereby avoided any additional cost to NationsBank.

This completely removes the OD fee from any reasonableness determination and puts it under the admonition of 12 C.F.R. § 7.4002(c), as it constitutes interest under 12 U.S.C. § 85 as specifically defined by 12 C.F.R. § 7.4001. In this context, pure profit, with no costs incurred, would not only be considered interest, but should be pro se unreasonable and usurious.

The lower court's summary judgment order, as adopted by the Eleventh Circuit, contains several other findings unsupported by the record. For example, the court noted the "... [d]efendant's OD fees are a fair and efficient method of allocating the administrative costs consequent to processing checks presented against insufficient funds." 33 F. Supp. 2d at 1051. However, no evidence was presented by NationsBank to that effect, and the evidence presented by Video Trax was clearly to the contrary. The Court then goes on to state that "depositors who maintain insufficient balances create operational costs directly attributed to their failure to comply with the terms of the agreement." 33 F. Supp. 2d at 1051. This is again a mere conclusion by the lower courts, since the actual evidence presented, in light of the automated "unofficial lines of credit" is directly to the contrary. These depositors, turned debtors, generate profits for the bank, at no greater cost than clearing any regular check. Again, the lower courts were confusing the process and distinctions between NSF checks and OD checks.

CONCLUSION

This petition is brought, requesting that this Court resolve a highly contradictory published decision below which ignores undisputed facts. The entry of summary judgment against the petitioner, where the bank essentially admitted that these overdraft charges were charged only in connection with an extension of credit, creates untenable legal positions effecting one of the largest banks in the country with millions of depositors. It is within the bank's control as to whether to extend credit or not, and they must live with the restrictions that come with extending credit. However, to say that the bank's advance of funds on behalf of the customer with an expectation that they be repaid is not an extension of credit, ignores the bank's own interpretation of its own actions.

Petitioner requests that this Court accept jurisdiction of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF ELEVENTH CIRCUIT, *VIDEO TRAX, INC. v. NATIONSBANK, N.A.*, 205 F.3d 1358 (11th Cir. 2000) DATED MARCH 14, 2000

VIDEO TRAX, INC., a Florida Corporation, on behalf of itself and all other persons and entities similarly situated, Plaintiff-Appellant,

v.

NATIONSBANK, N.A. (SOUTH), a National Banking Association, Defendant-Appellee.

No. 99-4007.

United States Court of Appeals,
Eleventh Circuit.

March 14, 2000.

* * *

Appeal from the United States District Court for the Southern District of Florida (No. 97-01586-CV-ASG); Alan S. Gold, Judge.

Before TJOFLAT, Circuit Judge, FAY, Senior Circuit Judge, and HANCOCK*, Senior District Judge.

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* Honorable James H. Hancock, Senior District Judge for the Northern District of Alabama, sitting by designation.

Appendix A

PER CURIAM:

The facts and procedural history of this case are set out in the district court's opinion reported at 33 F.Supp.2d 1041 (S.D.Fla.1998). For the reasons stated by the district court, id. at 1047-55 (part III.A. through III.C.), we find that the fees at issue do not constitute "interest" for purposes of the usury provisions of the National Bank Act, 12 U.S.C. §§ 85-86 (1994). Accordingly, the judgment of the court is

AFFIRMED.

APPENDIX B — OPINION OF DISTRICT COURT INCORPORATED BY ELEVENTH CIRCUIT, *VIDEO TRAX v. NATIONSBANK, N.A.*, 33 F. Supp. 2d 1041 (S.D. Fla. 1998) DATED DECEMBER 10, 1998

VIDEO TRAX, INC., a Florida corporation on behalf of itself and all other persons and entities similarly situated, Plaintiff,

v.

NATIONSBANK, N.A., a national banking association, Defendant.

No. 97-1586-CIV.

United States District Court,
S.D. Florida.

Dec. 10, 1998.

* * *

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

GOLD, District Judge.

THIS CAUSE is before the Court upon cross motions for summary judgment by Plaintiff, Video Trax, Inc. ("Plaintiff"), and Defendant NationsBank, N.A. ("Defendant"). Plaintiff brought this class action pursuant

to the National Bank Act, 12 U.S.C. §§ 85 and 86 (the "Bank Act"). Plaintiff alleges that the Overdraft Item Fee (the "OD fee") on checking accounts charged by Defendant, a national banking association, was actually a subterfuge to exact a usurious rate of interest in violation of the Bank Act. Defendant avers that the OD fee was an administrative cost to cover the processing of checks drawn in excess of the collected balance in a depositor's account, and was not interest as contemplated by the Bank Act and Florida's usury statute, §§ 687.01, et seq., Fla.Stat. Therefore, according to Defendant, since the OD fee is not "interest," it is not usurious.

The parties request the Court to determine, as a matter of law, whether the OD fee is really interest, based on an extension of credit to cover checks in excess of Plaintiff's uncollected balance in its business checking account. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1331, as arising under federal law. After careful consideration of the parties' arguments, the relevant case law and the record as a whole, and being otherwise advised in the premises, the Court concludes that the contested charges do not constitute interest, and thus, the transaction was not usurious.

I. Factual and Procedural Background

The parties concede that no disputed issues of fact exist to preclude judgment as a matter of law. The undisputed facts in the record reveal that Defendant is a nationally chartered banking institution, organized and existing under the laws

of the United States.[1] At all relevant times, Defendant was authorized to transact, and was transacting, business in branch offices located in the State of Florida.

Plaintiff is a corporation organized under the laws of the State of Florida.[2] At all times relevant to this cause, Plaintiff was authorized to do business, and was conducting business, in Dade County, Florida.

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1. Under our dual banking system, commercial banks have the option of being federally or state chartered. Federally chartered, or national, banks are governed by the National Bank Act of 1874, 12 U.S.C. §§ 21, et seq., which sets forth chartering criteria, basic banking and investment powers, lending and borrowing limitations, and corporate powers and duties. As required members of the Federal Reserve System and insured by the Federal Deposit Insurance Corporation ("FDIC"), national banks are also subject to the Federal Reserve Act, 12 U.S.C. §§ 221-522, and the FDIC Act, 12 U.S.C. §§ 1811, et seq.

2. On February 2, 1998, the Court entered an agreed order pursuant to the parties' Joint Stipulation and Agreement Regarding Class Certification. It was agreed that the class would be defined as the holders of commercial and other non-consumer business deposit accounts opened in Florida with Defendant, and its predecessors, who at any time during the two years preceding commencement of this action on May 20, 1997, were charged interest and/or OD fees or similar fees as a result of the presentment and payment of checks drawn on their respective accounts at times when uncollected or insufficient funds existed in the accounts, which interest and/or OD fees, if legally required to be included for the purpose of calculating interest, would result in a usurious rate of interest. Notice to the class was deferred until such time as the Court deemed necessary for notice to be extended to potential class members. As of this date, no notice has been forwarded, nor has the Court been requested to address the issue.

Appendix B

On June 10, 1992, Plaintiff opened a Simple Analysis Business Checking account at NCNB National Bank of Florida, N.A., Defendant's predecessor. The obligations of the parties were governed by the signature cards, deposit agreements, and schedules of fees in effect from the inception of the account until the account was terminated on February 18, 1997.

As evidenced by the account agreement, Plaintiff agreed in writing to pay a flat fee when a check presented to Defendant for payment exceeded the collected balance in Plaintiff's account. In addition, Defendant charged interest on overdraft sums to the extent those sums exceeded collected balances in Plaintiff's account.[3] The rate of interest charged was Defendant's prime rate plus 3%, and was subject to the maximum rate permissible by law.

Throughout the history of the parties' banking relationship, several checks were presented for payment against Plaintiff's account when the account contained insufficient funds to cover the checks. Pursuant to the deposit agreements and the bank's policies, which policies were incorporated into the deposit agreement between the parties, Defendant exercised its option to either honor or dishonor the checks. If a check was honored, an overdraft was permitted to exist in Plaintiff's account. If Defendant chose not to honor the check, it was returned unpaid. Plaintiff's

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3. An overdraft is the payment by a bank from its funds of a check drawn on it by a depositor who does not have sufficient funds on deposit to pay the check. See 1 Henry J. Bailey & Richard B. Hagedorn, Brady on Bank Checks: The Law of Bank Checks ¶ 19.01, at 19-2 (rev. ed.1997).

account history reflects that, pursuant to this practice, out of a total of 212 checks presented when insufficient funds existed in Plaintiff's account, ninety-two checks were honored, while 120 checks were returned.

According to Defendant's schedule of fees, a flat, per item fee was charged against Plaintiff's account whether the check was honored or returned. From January 1, 1995 through June 31, 1995, checking account customers, including Plaintiff, were charged a flat fee of $25 for all overdrafts or checks returned for insufficient funds. That fee increased to $27 from July 1, 1995 through the duration of Plaintiff's relationship at Defendant's institution. There was no relation between the flat fee charged and the amount of the check, overdraft, or period of time the overdraft existed in the account. The interest charged against the account for overdrafts was calculated on the basis of the average daily overdrawn account balance.

Plaintiff alleges that the periodic charges for interest, when aggregated with the overdraft fees, constitute "interest" in excess of the lawful amount allowed under the Bank Act. According to Plaintiff, Defendant assessed "interest" in excess of $18,000 on an average annual overdraft balance of approximately $6,000, a total of over 300% in interest.

Upon Plaintiff's demand for the "excess interest," Defendant refused to refund any monies, on the basis that the "not sufficient fund fee" (the "NSF fee") and the OD fee were administrative charges, commonly utilized in the banking industry to cover processing charges and to deter depositors from overdrawing their accounts. Defendant

contends that NSF and OD fees do not constitute "interest" within the meaning of the usury provisions of the Bank Act, and therefore, Plaintiff cannot avoid its contractual obligations by claiming protection under the usury laws.

II. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure authorizes entry of summary judgment where the pleadings and supporting materials demonstrate there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A material fact is one that might affect the outcome of the suit under the governing law. Id. A plaintiff cannot defeat a defendant's properly supported motion for summary judgment without an affirmative presentation of specific facts showing a genuine issue, and may not merely rely on the general allegations of the pleadings. Id. A mere scintilla of evidence is insufficient to defeat a motion for summary judgment:

> [I]n every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

Id. at 251, 106 S.Ct. 2505. In reviewing a motion for summary judgment the court focuses on "whether the

evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir.1997) (quoting Anderson, supra).

In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the Supreme Court established a two-prong framework of shifting burdens which must be employed by federal courts in determining whether there exists a genuine issue precluding summary judgment. This framework places the initial burden on the moving party to establish the absence of a genuine issue as to any material fact. Tyson Foods, Inc., 121 F.3d at 646 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970)). The moving party may discharge this burden by " 'showing'— that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325, 106 S.Ct. at 2554. In deciding whether the burden has been satisfied, the Court must view the evidence and all reasonable inferences arising from it in the light most favorable to the nonmoving party. Tyson Foods, Inc., 121 F.3d at 646 (citing Adickes, 398 U.S. at 157, 90 S.Ct. at 1608).

Once the movant has satisfied its burden, the burden shifts to the nonmoving party to present evidence sufficient to make a "showing that the jury could reasonably find for that party." Allen, 121 F.3d at 646 (citations omitted). Facts asserted by the party opposing a summary judgment must be regarded as true if supported by affidavit or other evidentiary material. Coke v. General Adjustment Bureau,

Inc., 640 F.2d 584, 595 (5th Cir.1981). However, where the nonmoving party bears the burden of proof of an essential element to that party's case, summary judgment is warranted when the party fails to make a showing sufficient to establish the essential element. Celotex, 477 U.S. at 323, 106 S .Ct. at 2552. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. The Eleventh Circuit commented on the nonmovant's burden:

> For issues on which the non-movant would bear the burden of proof at trial, the means of rebuttal available to the non-movant vary depending on whether the movant put on evidence affirmatively negating the material fact or instead demonstrating an absence of evidence on the issue. Where the movant did the former, then the non-movant must respond with evidence sufficient to withstand a directed verdict motion at trial on the material fact sought to be negated. Where the movant did the latter, the non-movant must respond in one of two ways. First, he or she may show that the record in fact contains supporting evidence, sufficient to withstand a directed verdict motion, which was "overlooked or ignored" by the moving party, who has thus failed to meet the initial burden of showing an absence of evidence. Celotex, 477 U.S. at 332, 106 S.Ct. at 2557 (Brennan, J., dissenting). Second, he or she may come forward with additional evidence sufficient to withstand a

directed verdict motion at trial based on the alleged evidentiary deficiency.

Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1116-17 (11th Cir.1993). Ultimately, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Tyson Foods, Inc., 121 F.3d at 646.

III. Analysis and Discussion

The Amended Complaint, although not delineated as such, consists of a single count alleging that Defendant's practice of charging OD fees, in addition to assessing interest against the average daily overdrawn account balance, constituted usury. The parties agree that the sole issue for determination is whether the OD fee was really "interest" that, when aggregated with the interest charged on the average daily overdrawn balance, was usurious.

Plaintiff does not challenge the interest rate charged against the average daily balance. Plaintiff only seeks a ruling that, since an overdraft situation amounted to an extension of credit — like a loan — the OD fee was actually "interest." Plaintiff argues that Defendant's characterization of the OD fee as an administrative processing fee is pretext, because the amount of the fee exceeded the amount necessary for processing checks presented against an overdrawn account. Thus, the Court addresses only the character of the OD fee and the propriety of Defendant's practice in assessing such fees.

Appendix B

Several issues must be addressed to reach a decision on the character and propriety of Defendant's OD fee. First, the Court must determine the controlling law for characterizing the fee. Plaintiff contends that, since Defendant is a nationally chartered bank, federal law, specifically the Bank Act and case law interpreting the Bank Act, applies, and that federal law preempts state law except as to the rate of interest the state allows a bank to charge its customers. Defendant avers that state law is not totally preempted. Defendant argues that state law governs not only the rate of interest which banks may legally charge, but also controls what constitutes "interest," as opposed to non-interest, administrative charges.

The second issue relative to resolving this non-factual dispute, which is dependent on the resolution of the preceding issue, is what is included within the meaning of "interest." Third, the Court must determine whether the payment of checks presented against an overdrawn account is an extension of credit, creating a loan transaction to which usury laws apply. The fourth, and ultimate, issue for the Court is whether the OD fees charged by Defendant are usurious, and whether any of the elements establishing usury require factual determinations, thereby precluding judgment as a matter of law and necessitating a trial.

Neither the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, nor any district courts therein, including the Southern District of Florida, nor any Florida state court have squarely addressed the specific issue before the Court. Although this action presents a case of first impression within this jurisdiction, ample analogous precedent exists to support

the conclusion that Defendant's OD fees are not interest which would create a usurious rate. Moreover, federal district courts within other circuits which have analyzed the difference between interest and administrative charges assessed by national banks have reached the same conclusion, and are persuasive. See, e.g., Nicolas v. Deposit Guar. Nat'l Bank, 182 F.R.D. 226 (S.D.Miss.1998); Beech v. Trustmark Nat'l Bank, No. 97cv187GR (S.D.Miss. Jan. 13, 1998).

A. The Purpose Behind the National Bank Act

The National Bank Act was enacted to equalize the standing of national banks with their state-chartered competitors, and to prevent state legislatures from discriminating against national banks. See Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 314, 99 S.Ct. 540, 548, 58 L.Ed.2d 534 (1978) (Congressional intent in providing that national banks "may . . . charge . . . interest at the rate allowed by the laws of the State, Territory or District where the bank is located, . . . and no more" was to allow national banks to compete with state-chartered banks and to give certain "advantages to National banks over their State competitors."). Section 85 of the Bank Act prescribes the amount of interest that a national bank may charge:

> Any association may take, receive, reserve, and charge on any loan . . . interest at the rate allowed by the laws of the State . . . where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the federal reserve bank in the Federal

> reserve district where the bank is located, whichever may be the greater, and no more . . .

12 U.S.C. § 85. The remedy for charging a rate of interest in excess of that prescribed under § 85, which is regarded as usurious, is the "forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon." 12 U.S.C. § 86.

1. The National Bank Act Does Not Absolutely Preempt State Usury Laws

Plaintiff contends that, as a nationally chartered bank, Defendant's practices are governed solely by federal law, and that state law only controls the actual rate of interest, not what constitutes "interest" in the context of usury prohibitions. However, the Bank Act does not contain an express statement that Congress intended to preempt state law in its entirety. In the absence of express statutory preemption, conflict preemption may be implied where it is impossible to comply with both state and federal requirements, or where state law stands as an obstacle to achieving the intent of Congress. See Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995). As with express preemption, conflict preemption will not be found unless it is the clear intent and purpose of Congress. See CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993); see also California v. ARC America Corp., 490 U.S. 93, 100-01, 109 S.Ct. 1661, 1665, 104 L.Ed.2d 86 (1989) (preemption of state law can be found only when "Congress intends that federal law occupy a given

field," or when state law "actually conflicts with federal law, that is, when compliance with both state and federal law is impossible . . . or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.") (quoting sources omitted).

Banking is not an area in which Congress has evidenced an intent to occupy the entire field to the exclusion of the states, and thus, state legislatures may legislate in all areas not expressly or impliedly preempted by federal legislation. See, e.g., Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 38, 100 S.Ct. 2009, 2016, 64 L.Ed.2d 702 (1980); First Nat'l Bank v. Missouri, 263 U.S. 640, 656, 44 S.Ct. 213, 215, 68 L.Ed. 486 (1924). In fact, federal courts have recognized that "national banks have traditionally been governed in their daily course of business far more by the laws of the State than of the Nation. All [of] their contracts are governed and construed by State laws." National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353, 362, 19 L.Ed. 701 (1869). Except for a few instances in which Congress has explicitly preempted state regulation of national banks, "regulation of banking has been one of dual control since the passage of the first National Bank Act in 1863." National State Bank v. Long, 630 F.2d 981, 985 (3d Cir.1980). Thus, the rule is that state laws apply, "the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge [their] duties. . . ." McClellan v. Chipman, 164 U.S. 347, 357, 17 S.Ct. 85, 87, 41 L.Ed. 461 (1896); see also Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 248, 64 S.Ct. 599, 607, 88

L.Ed. 692 (1944) ("national banks are subject to state laws, unless those laws infringe the national banking laws or impose undue burden on the performance of the banks' functions").

Since Congress has not displaced all state legislation affecting national banks, state law will be preempted only "to the extent that it actually conflicts with federal law." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984). Courts must not lightly infer preemption, and it is the burden of the party claiming Congress intended to preempt state law to prove it. See Gregory v. Ashcroft, 501 U.S. 452, 460, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991) (the authority to displace a sovereign state's law is "an extraordinary power . . . that we must assume Congress does not exercise lightly"); see also Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) (consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress.").

2. Interpreting the Lawful Rate of Interest Under the National Bank Act

Through the Bank Act, Congress established a general system of regulations governing nationally-chartered banks and adopted state laws only as they fixed the amount of interest which could be charged. See Evans v. National Bank of Savannah, 251 U.S. 108, 111, 40 S.Ct. 58, 59, 64 L.Ed. 171 (1919). Although federal laws are frequently intended

to have uniform nationwide application, Congress may provide that federal enactments be interpreted by reference to state law. See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43, 109 S.Ct. 1597, 1605, 104 L.Ed.2d 29 (1989). "Congress sometimes intends that a statutory term be given content by the application of state law." Id. In such instances, a federal court may properly use state law to fill in the gaps within a federal legislative scheme. See, e.g., Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 107-09, 111 S.Ct. 1711, 1722-23, 114 L.Ed.2d 152 (1991).

Plaintiff's assertion that state laws limiting bank service charges are preempted by the Bank Act's comprehensive federal statutory scheme governing the deposit-taking function of national banks is palpably erroneous. There is no comprehensive federal statutory scheme governing the taking of deposits. Only one section of the Bank Act even relates to this function, and merely authorizes banks to accept deposits. See 12 U.S.C. § 24. This section may, by implication, also authorize banks to charge for deposit-related services as an incidental power necessary to carry on the business of receiving deposits. But such implied authority does not constitute a regulatory scheme so comprehensive as to displace state law. See Joy v. North, 519 F.Supp. 1312, 1323 (D.Conn.1981), reversed on other grounds, 692 F.2d 880 (2d Cir.1982), cert. denied sub nom., Citytrust v. Joy, 460 U.S. 1051, 103 S.Ct. 1498, 75 L.Ed.2d 930 (1983) ("This section [12 U.S.C. § 24] simply sets forth the general corporate powers of associations. It does not provide that the powers therein are meant to preempt state law.").

Appendix B

The parties do not dispute that § 85 of the Bank Act expressly preempts all attempts by state legislatures to regulate the rate of interest which a national bank may charge in connection with a loan. The disagreement between the parties arises over the items and charges which are encompassed within the definition of the term "interest." "The question, at bottom, is one of statutory intent, and we accordingly 'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' " Morales v. Trans World Airlines, Inc., 504 U.S. 374, 382, 112 S.Ct. 2031, 2036, 119 L.Ed.2d 157 (1992) (quoting FMC Corp. v. Holliday, 498 U.S. 52, 57, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990)). Thus, the issue of whether Florida law has been preempted by § 85 of the Bank Act necessarily involves a determination of the intent of Congress when it employed the term "interest" in drafting the Bank Act.

B. The Meaning of "Interest" As Contemplated in the Usury Prohibitions

Plaintiff alleges that the OD fees are "interest" under the Bank Act, and that the "interest" charged by Defendant, in the form of OD fees, exceeds that allowed by Florida law. Thus, Plaintiff alleges that Defendant's practices are usurious.

The Bank Act does not expressly define "interest rate" or "rates of interest" as used in § 85. Moreover, there is nothing in the legislative history of the Bank Act from which to glean a possible congressional intent to include the OD fees at issue within the definition of "interest." In the absence

of an express definition or clear congressional intent, it is incumbent upon the Court to "begin with the language employed by Congress," and assume that the ordinary meaning of "interest" accurately expresses legislative purpose. Morales, 504 U.S. at 382, 112 S.Ct. at 2036; see also CSX Transportation, 507 U.S. at 664, 113 S.Ct. at 1737; FMC Corp., 498 U.S. at 57, 111 S.Ct. at 407. "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country [,] they are presumed to have been used in that sense unless the context compels to the contrary." Lorillard v. Pons, 434 U.S. 575, 583, 98 S.Ct. 866, 871, 55 L.Ed.2d 40 (1978). Courts interpreting the meaning of "interest" must apply a "strict, that is literal construction" to avoid subjecting banks to double interest penalties under the Bank Act. See Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409, 410, 21 L.Ed. 862 (1873).

Interest has been understood to include any compensation allowed by law or fixed by the parties for the use or forbearance of money, or the price which is fixed for the use of money. See Deputy v. DuPont, 308 U.S. 488, 498, 60 S.Ct. 363, 368, 84 L.Ed. 416 (1940). The common definition of "interest rate" has been held to be the "percentage of an amount of money which is paid for its use for a specified time." Black's Law Dictionary 730 (5th ed.1979). Similarly, "interest" has been defined as "a charge for borrowed money[,] generally a percentage of the amount borrowed." Webster's Ninth New Collegiate Dictionary 630 (1989) (emphasis added). The plain and ordinary meaning of "interest" or "interest rate" does not include OD fees, NSF fees, and similar contingent or default

charges. See, e.g., United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 328, 83 S.Ct. 1715, 1722, 10 L.Ed.2d 915 (1963) (charges for banking services, "such as service charges for checking privileges, are free of governmental regulation, state or federal"); see also Lloyd v. Scott, 29 U.S. (4 Pet.) 205, 226, 7 L.Ed. 833 (1830).

The determination of the maximum amount of interest which may be charged for the use of money loaned has always been within the police power of the state, and the details of and exceptions to the legislation have rested within the discretion of the state legislature. See Griffith v. Connecticut, 218 U.S. 563, 568-69, 31 S.Ct. 132, 133, 54 L.Ed. 1151 (1910). In § 85 of the Bank Act, Congress expressly and unambiguously stated that a national bank was subject to the interest provision of the laws of the state in which the bank was located. Accordingly, Congress may look to the laws of the states to define the term "interest," as well as to set the allowable rate of interest. See Tikkanen v. Citibank (South Dakota) N.A., 801 F.Supp. 270, 278 (D.Minn.1992).

1. Overdraft Fees on Demand Deposit Checking Accounts Are Not "Interest"

Even assuming that the Bank Act preempts state law regarding the characterization of interest considered usurious, which the Court does not concede is appropriate, Plaintiff's claim that the OD fees are interest and therefore are subjected to usury laws must fail. As a threshold matter, except as the term "interest" relates to credit transactions, such as loans or credit card services, no provision of federal law discusses

bank charges for NFS checks, or, for that matter, bank charges for any service performed for depositors of checking accounts.

"Interest" as used in the Bank Act includes:

> any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. . . .

12 C.F.R. § 7.4001(a) (1997). Because the OD fees were not imposed in connection with a credit transaction, the fees are not interest as defined by the Bank Act.[4] Rather, the fee arises from the terms of the deposit agreements, which incorporate the schedule of fees. These types of charges are addressed by 12 C.F.R. § 7.4002, which provides:

> (a) Customer charges and fees. A national bank may charge its customers non- interest charges and fees, including deposit account service charges. . . .

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4. Although Plaintiff contends that the OD fees were actually imposed in exchange for the extension of credit for honoring a check drawn on accounts with insufficient collected balances, the Court has found otherwise. This finding is addressed in detail infra.

(b) Considerations. The establishment of non-interest charges and fees, and the amounts thereof, is a business decision to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. A bank reasonably establishes non-interest charges and fees if the bank considers the following factors, among others:

(1) The cost incurred by the bank, plus a profit margin, in providing the service;

(2) The deterrence of misuse by customers of banking services;

(3) The enhancement of the competitive position of the bank in accordance with the bank's marketing strategy; and

(4) The maintenance of the safety and soundness of the institution.

(c) Interest. Charges and fees that are "interest" within the meaning of 12 U.S.C. § 85 are governed by § 7.4001 and not by this section.

The OD fees charged by Defendant are precisely those described in § 7.4002.

Moreover, the fees at issue substantially satisfy the reasonableness factors set forth in 12 C.F.R. § 7.4002(b). Defendant's "Noninterest Income Project" report states that

the bank's primary concern "is the extensive daily aggregate work effort by the branches and officers expended in the processing of NSF/OD transactions . . . [which] requires substantial review and intervention by the branches and officers." Defendant determined that the decision to pay or return a check "sends a distinct message to the customer as to whether their behavior is to be encouraged or discouraged."

Analyzing the pattern of customer behavior and recognizing the additional financial risk to the bank, Defendant concluded that, since the majority of the potential overdraft checks are eventually honored, and the fact that the bank receives no additional fees when the item is presented a second time, honoring the check the first time provides little additional risk. Nevertheless, Plaintiff challenges Defendant's application of the considerations prescribed in § 7.4002(b), claiming that the fees are excessive for the services rendered. Plaintiff alleges that the cost analysis, based on the amount of the OD fee and the actual expense incurred by Defendant for processing an overdrawn check, does not justify the amount of the fee imposed. However, Plaintiff has presented no evidence to substantiate its accusation that the OD fees were unconscionable and were imposed in contravention of the considerations required for analyzing and assessing the propriety of the fees.[5]

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5. Plaintiff complains that Defendant has not produced documentation of cost versus profit analysis. However, 12 U.S.C. § 484 provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal Law." Cases construing this section do not clarify when an unauthorized person

(Cont'd)

Even if Plaintiff proffered competent evidence of profit percentages, such evidence does not automatically prove that the fees were unreasonable. In fact, the Code of Federal Regulations permit nationally chartered banks to recover the "cost incurred" for processing bad cheeks, "plus a profit margin." 12 C.F.R. § 7.4002(b)(1).

Additionally, national banks are required to set non-interest charges and fees based on the "maintenance of the safety and soundness of the institution." 12 C.F.R. § 7.4002(b)(4). Defendant's OD fees are a fair and efficient method of allocating the administrative costs consequent to processing checks presented against insufficient funds. Depositors who maintain insufficient balances create operational costs directly attributable to their failure to comply with the terms of their agreement. Banks must adopt systems to track such behavior and respond to it appropriately. Since banks must refrain from engaging in unsafe and unsound practices, see 12 U.S.C. § 1818(e), it is more than conceivable that a charge for overdrawn checks

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(Cont'd)
or agency may, without violating this section, examine bank records for a limited purpose. Compare Guthrie v. Harkness, 199 U.S. 148, 157-59, 26 S.Ct. 4, 7-8, 50 L.Ed. 130 (1905) with National State Bank v. Long, 630 F.2d 981, 989 (3d Cir.1980). Thus, it is possible that § 484 may serve to limit Plaintiff's ability to examine records by way of discovery. Nevertheless, Defendant has represented that the cost analysis records requested by Plaintiff do not exist. Therefore, Plaintiff was required to support its argument of the unreasonableness of the amount of the OD fee using other methods.

which is low enough to avoid attack as unreasonable would fail to discourage the writing of such checks.[6]

2. Defendant's OD Fees Are Not Interest Under Florida Law

The Office of the Comptroller of the Currency has declared that the federal definition of "interest" does not take precedence over the manner in which states define the term. See 12 C.F.R. § 7.4001(c) ("The Federal definition of the term 'interest' does not change how interest is defined by the individual states (nor how the state definition of interest is used) solely for purposes of state law."). Therefore, if certain fees are not considered interest "for purposes of evaluating compliance with state usury limitations . . . when calculating the maximum interest that lending institutions may charge under those limitations," such fees are not deemed to be interest under federal law. Id.

Applying Florida law, the OD fee charged by Defendant for the presentment of checks against an overdrawn account is not interest for the purpose of determining whether a transaction is usurious. Although the terms "fee" and "charge," in their legal acception, have a very broad meaning, as used generally, they refer to a price demanded for services rendered, "to fix or demand such a price, or any act by which the charging party manifests his purpose to demand the

6. The OCC has the authority to enjoin a bank service charge, or any other act of a national bank, considered to be an unsafe or unsound practice. See 12 U.S.C. § 1818(b). The Court is unaware of any instance in which this authority has ever been used to curb excessive bank charges.

amount fixed or allowed for the [service]." Benson v. First Trust & Savings Bank, 105 Fla. 135, 142 So. 887, 891 (Fla.1932).

Contrary to Plaintiff's assertion, Florida's formula for calculating interest on loans and credit advances belies the fact that Defendant's OD fees are a subterfuge for excessive interest. The rate of interest on Florida transactions is:

> calculated by first computing the advance or forbearance as a percentage of the total stated amount of such loan. . . . This percentage shall then be divided by the number of years, and fractions thereof, of the loan . . . according to its stated maturity date, without regard to early maturity in the event of default. The resulting annual percentage rate shall then be added to the stated annual percentage rate of interest to produce the effective rate of interest for purposes of this chapter.
>
> § 687.03(3), Fla.Stat. (emphasis added).

The clear language of § 687.03(3) refers to the particular term stated on the face of a loan document. The statute explicitly states that the calculation of unlawful rates of interest "shall apply only to loans and advances of credit." § 687.03(2)(b), Fla.Stat. Thus, Plaintiff's usury claim cannot stand unless Defendant's OD fees were a charge for receiving a loan or were incident to or a condition for the extension of credit.

Appendix B

C. Honoring Checks on Overdrawn Accounts Is Not an Extension of Credit

Plaintiff argues that, by honoring checks for which insufficient funds exist in a checking account, Defendant was actually extending credit to Plaintiff. This extension of credit, according to Plaintiff, is synonymous with a loan. Therefore, the OD fee assessed on these "loans" constitutes interest. Accordingly, since the OD fee charged by Defendant exceeded the lawful rate of interest permitted in Florida, it was usurious.

Plaintiff relies heavily on Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996), to support its contention that a loan was extended in connection with its checking account. The Court finds Plaintiff's reliance on Smiley is misplaced.

The Smiley Court unanimously held that the word "interest" in § 85 was ambiguous and that the Comptroller's judgment as to its meaning was entitled to deference under the principles set forth in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). See Smiley, 116 S.Ct. at 1732-33; Doe v. Norwest Bank Minnesota, N.A., 107 F.3d 1297, 1301-02 (8th Cir.1997). The Court then concluded that the OCC's inclusion of credit card late fees within the meaning of "interest" was a reasonable interpretation of the statute. Smiley, 116 S.Ct. at 1735. Because the law of South Dakota, Citibank's home state, permitted banks to charge late fees, the determination that late fees are interest for purposes of the Bank Act led to the dismissal of the state-law claims of Smiley, a California resident. See id. at 1732.

Here, the Court faces a different issue. The late fees at issue in Smiley arose from that plaintiff's relationship with the bank as a credit card holder, an arrangement which unambiguously is based on "an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended." 12 C.F.R. § 7.4001(a). A credit card holder fits neatly into the debtor role in a creditor/debtor relationship, which is essential to invoke § 85 of the Bank Act. In the instant case, Defendant's OD fees stem from a deposit agreement between a bank and one or more of its depositors. Although a creditor/debtor relationship exists, the roles are reversed: the bank is the debtor and the depositor is the creditor. MJZ Corp. v. Gulfstream First Bank & Trust, N.A., 420 So.2d 396, 397 (Fla. 4th DCA 1982). Thus, the threshold question is whether the OD fees in this case are "connected with credit extension or availability," 12 C.F.R. § 7.4001(a), and accordingly, whether the usury laws apply at all.

Significantly, the Smiley Court approved the definition of "interest" found in 12 C.F.R. § 7.4001, which includes a reference to NSF charges. However, § 7.4001 clearly provides that NSF fees are interest if, and only if, the fee is a "payment compensating a creditor . . . for an extension of credit." 12 C.F.R. § 7.4001(a). In the present case, the NSF and OD fees charged to Plaintiff were not compensating Defendant for an extension of credit. The fees were charged for the processing of bad checks. Thus, the holding and reasoning of the Supreme Court in Smiley is inapplicable.

This Court is without benefit of binding law to resolve this unique issue in Plaintiff's favor. Indeed, the federal cases

which analyze the usurious nature of interest, and charges which can be incorporated into the calculation of interest, deal with loans and similarly structured transactions. These transactions unambiguously entail the extension of credit.[7] This, alone, raises suspicions about Plaintiff's novel argument. However, by analogy, case law exists which distinguishes loans from check transactions, and compels a determination that the payment of checks against an overdrawn account is not an extension of credit, and that the OD fee charged for such services is not interest.

1. Loan Transactions Versus Checking Account Relationships

Plaintiff would argue that the word "loan" is intentionally broad, and covers all circumstances in which there has been a de facto loan. Plaintiff urges that even Defendant considers the honoring of checks drawn against overdrawn accounts an "unsecured extension of credit." Such a broad interpretation of this term places form over substance, in contravention of the intent and purpose behind the usury laws.

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7. See, e.g., Citizens' Nat'l Bank v. Donnell, 195 U.S. 369, 373-74, 25 S.Ct. 49, 49-50, 49 L.Ed. 238 (1904) (charges for failure to pay a promissory note when due); Cades v. H & R Block, Inc., 43 F.3d 869 (4th Cir.1994) (flat charges for tax refund anticipation loans); Fisher v. First Nat'l Bank, 548 F.2d 255, 258-59 (8th Cir.1977) (cash advance fees on credit cards); Northway Lanes v. Hackley Union Nat'l Bank & Trust Co., 464 F.2d 855 (6th Cir.1972) (closing costs charged on real estate loans); Panos v. Smith, 116 F.2d 445, 446 (6th Cir.1940) (charges for mortgage taxes and recording fees); Cronkleton v. Hall, 66 F.2d 384, 387-88 (8th Cir.1933) (bonuses and commissions paid to a lender).

Appendix B

Although a loan may exist regardless of the form of the transaction, "whether or not [a] transaction constitutes a loan, is to be determined from the surrounding facts in the particular case." Calcasieu-Marine Nat'l Bank of Lake Charles v. American Employers' Ins. Co., 533 F.2d 290, 297 (5th Cir.1976) (quoting source omitted).[8] Courts should not interpret the transaction in a manner which would defeat the probable intentions of the parties. See id. at 296.

The classic definition of a loan is "a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows." In re Grand Union Co., 219 F. 353, 356 (2d Cir.1914). Moreover, "to constitute a loan, there must be a contract whereby, in substance one party transfers to the other a sum of money which that other agrees to pay absolutely, together with such additional sums as may be agreed upon for its use." Id. (emphasis added). Essentially, it is a contractual arrangement between two parties.

In contrast, a check "is a contract in writing by which the drawer contracts with the payee that the bank will pay to the payee therein the amount designated on presentation." Sawgrass Builders, Inc. v. Realty Coop., Inc., 172 Ga.App. 324, 323 S.E.2d 243, 244 (Ga.Ct.App.1984) (quoting source omitted). Unlike a loan note, which is a promise by the maker to pay a specified sum and described as a two-party instrument — the parties being the maker and a payee — a

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8. The Eleventh Circuit, in Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), adopted as binding precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

check constitutes an order on a third party, a bank, to pay a specified sum and is a three-party instrument — the parties being a drawer, a drawee or payor bank, and a payee. The differences between these types of instruments and underlying transactions are apparent in the respective definitions promulgated in the Uniform Commercial Code. Compare UCC § 3-104(f) (1990) (definition of check) with UCC § 3-104(e) (1990) (definition of note).

The Supreme Court has noted the dichotomy between loan documentation and checks. See Don E. Williams Co. v. Commissioner of Internal Revenue, 429 U.S. 569, 97 S.Ct. 850, 51 L.Ed.2d 48 (1977). In that case, the Court declared that:

> The promissory note, even when payable on demand and fully secured, is still, as its name implies, only a promise to pay, and does not represent the paying out or reduction of assets. A check, on the other hand, is a direction to the bank for immediate payment, is a medium of exchange, and has come to be treated for federal tax purposes as a conditional payment of cash.

Id. at 582-83, 97 S.Ct. at 858.

When a bank honors a check, it reasonably expects the check to be paid in the normal course of business. See Pioneer Valley Sav. Bank v. Indemnity Ins. Co., 225 F.Supp. 404, 411 (N.D.Iowa 1964), aff'd, 343 F.2d 634 (8th Cir.1965). Checks, as the most common items handled by banks, are handled in bulk as cash items on the assumption that they

will be honored in most cases; provisional credits are entered immediately at all stages of the collection process, and become final without further action upon payment by the drawee bank. See Calcasieu-Marine Nat'l Bank, 533 F.2d at 300 (citation omitted).

The Court cannot agree with Plaintiffs argument that the deposit agreement relative to Plaintiff's checking account treats an overdraft as an application for advance credit. The implementation of OD and NSF fees was based on the banking industry's awareness that a depositor often writes checks under the mistaken belief that he has, or will have, sufficient funds to cover the check, without any intent to apply for credit. The imposition of the fee is solely contingent upon the depositor's failure to comply with the terms of the deposit agreement, which require the maintenance of sufficient funds to cover all checks presented.

2. Contingent Default Fees Are Not Interest

There is a significant body of law establishing that fees imposed as a result of a contingency are not considered interest in divining a violation of the usury laws. Prior to the passage of the Bank Act in 1864, the U.S. Supreme Court examined the dichotomy between "interest rates" and "contingent default charges," and determined that the latter are not interest for purposes of § 85. See Lloyd v. Scott, 29 U.S. at 226. In addressing whether late fees constituted interest, the Court held that:

> If a party agree[s] to pay a specific sum exceeding the lawful interest, provided he do[es] not pay the

> principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, which is considered a penalty.

Id. Accordingly, a fee, even when calculated according to a percentage of the amount owed, is not rendered usurious by a depositor's agreement to pay the fee contingent upon his delinquency, because the payment or non-payment of that fee is completely within the depositor's control.

One year prior to the enactment of the Bank Act, the Supreme Court once again spoke to the dissimilarities between interest rates and contingent default charges, and stated that when "[t]he payment of anything additional depends also upon a contingency, and not upon any happenings of a certain event, [such is] insufficient to make a loan usurious." Spain v. Hamilton's Administrator, 68 U.S. (1 Wall.) 604, 626, 17 L.Ed. 619 (1863).

These cases stand for the proposition that only where the charge is required for a loan, and not where it is contingent on the happening of an uncertain event, will the charge be considered "interest." Because Congress is presumed to have adopted the federal common law meaning of "interest" in enacting § 85, see Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979); Burns v. Alcala, 420 U.S. 575, 580-81, 95 S.Ct. 1180, 1184, 43 L.Ed.2d 469 (1975), the statute cannot be interpreted to include contingent default charges within the depositor's control, such as the OD fees imposed by Defendant in this case.

The logic behind this distinction is clear. If charges and fees within the depositors control, such as the OD fees in dispute, are deemed "interest," banks could not possibly know whether the ultimate rate on any given account would exceed the interest ceiling provided by law. The depositor could, therefore, render his account usurious, and hence unlawful, by simply maintaining insufficient funds in the account, thereby incurring an amount of fees equal to a usurious rate.

In the absence of clear congressional intent to the contrary, the Court finds that the term "interest rates" or "rates of interest" as used in § 85 of the Bank Act ought to be construed in compliance with the term's plain and ordinary meaning, and its well entrenched federal common law meaning, so as not to include contingent default fees. See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521-22, 112 S.Ct. 2608, 2620, 120 L.Ed.2d 407 (1992).

3. Florida Is in Accord Regarding the Assessment of Contingent Default Fees

Florida courts adhere to Supreme Court precedent, and do not characterize fees received for participating in uncertain transactions as interest for purposes of usury determinations. See, e.g., Kraft v. Mason, 668 So.2d 679, 684 (Fla. 4th DCA 1996). Repeatedly, those courts have found that an agreement to pay fees is not usurious when payment depends upon a contingency. See, e.g., Bailey v. Harrington, 462 So.2d 861 (Fla. 3d DCA), review denied, 472 So.2d 1180 (Fla.1985).

Appendix B

Plaintiff admits that "[t]he charging of the 'Overdraft Item Fee' was a condition of the extension of credit when the Bank allowed a customer to overdraw their account." Plaintiff's Motion for Summary Judgment, at page 10 (emphasis added). It was within Plaintiff's control to avoid the OD fees. Reviewing the record before the Court, it is clear that no part of the deposit agreement contains a promise to pay anything absolutely in addition to the amount of the check presented against Plaintiff's account. The payment of anything additional depends entirely on a contingency, and not upon any happening of a certain event, which of itself is insufficient to make Defendant's OD fee usurious.[9] Accordingly, Plaintiff's contention that Defendant's OD fee is a subterfuge for charging a usurious rate of interest must fail.

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9. This holding is consistent with a Texas Supreme Court ruling cited by Defendant. See First Bank v. Tony's Tortilla Factory, Inc., 877 S.W.2d 285 (Tex.1994). In determining whether NSF fees constituted interest, the Texas Supreme Court held that "[f]ees which are an additional charge supported by a distinctly separate and additional consideration, other than the simple lending of money, are not interest and thus do not violate the usury laws." Id. at 287. Although the decision is not binding on this Court, since it is a decision by a state tribunal and involved a state chartered, as opposed to a national, bank, the fact that the OCC as well as other federal courts have cited Tony's Tortilla with approval, see, e.g., Terrell v. Hancock Bank, 7 F.Supp.2d 812, 817 (S.D.Miss.1998), it is persuasive in determining how Plaintiff's usury claim would be resolved by a Florida court.

Appendix B

D. The Propriety of Summary Judgment

Having determined that state law controls not only the rate of lawful interest that a bank, national or state-chartered, may charge, but also the classification of charges subject to the usury laws, the Court must determine whether judgment as a matter of law is appropriate. Applying Florida's elements for establishing a cause of action for usury to the circumstances raised in this record, permits a legal resolution of the matter. Thus, resolving the issue by summary judgment is appropriate.

1. Elements of a Usury Claim

Florida law sets forth four elements necessary to substantiate the usurious nature of a transaction. To establish usury, there must be: (1) a loan, either express or implied; (2) an understanding between the lender and the borrower that the money must be repaid; (3) a greater rate of interest than is allowed by law; and (4) corrupt intent on the part of the lender to take more than the legal rate of interest for the use of the money loaned. See Dixon v. Sharp, 276 So.2d 817, 819 (Fla.1973); see also Lloyd, 29 U.S. at 224 (establishing the elements of usury under federal common law). The party challenging the rate of interest and claiming usury has the burden of establishing these elements. See Dixon, 276 So.2d at 820; Swanson v. Gulf West Int'l Corp., 429 So.2d 817, 819 (Fla. 2d DCA 1983); see also In re Concrete Express, Inc., 87 B.R. 718, 721 (Bankr.S.D. Fla.1988). In this case, Plaintiff has the burden of proof on all elements of the prohibition to sustain a finding of usury under § 687.02 of the Florida Statutes.

Appendix B

Having extensively discussed the dichotomy between interest and administrative fees, it is unnecessary to belabor this point. The Court has also addressed the differences between a loan and a non-loan transaction, such as a simple checking account, and has determined that honoring a check presented against an account with insufficient funds is not an extension of credit. This finding is buttressed by observing that Defendant charged the same fee whether it honored or rejected a check for payment from Plaintiff's checking account. By rejecting the check, it cannot be said that credit was extended for the use of funds. Thus, there is no support for Plaintiff's argument that the character of the fixed OD fee is different from the NSF fee, and is, therefore, interest for the purpose of determining usury. Consequently, Plaintiff has failed to establish the first and third elements of an action for usury.

Even assuming Plaintiff could provide a legal basis to support its contention that the honoring of the subject checks was actually an advance of money in the form of a loan, that the OD fees are a form of interest under Florida law, and that the aggregation of the interest calculated on the amount by which the overdraft exceeded the collected balance and the OD fee created a rate of interest in excess of the lawful rate, Plaintiff cannot prevail on its usury claim. Having failed to meet its burden of proving Defendant had a purposeful intent to violate the law, Plaintiff has not satisfied the fourth element necessary to sustain its cause of action.

2. Plaintiff Has Not Established Corrupt Intent on the Part of Defendant

Understanding the purpose behind the enactment of the usury laws is helpful in determining whether a transaction is usurious, providing a legal remedy to an injured debtor. In passing Florida's usury statute, the legislature sought to "bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans." Chandler v. Kendrick, 108 Fla. 450, 146 So. 551, 552 (Fla.1933); see also Cesary v. Second Nat'l Bank of North Miami, 369 So.2d 917, 921 (Fla.1979). In sum, Chapter 687 of the Florida Statutes was designed to protect borrowers from paying unfair and excessive interest to creditors who knowingly and willfully charge or receive interest in excess of 25% per annum. See Jersey Palm- Gross, Inc. v. Paper, 658 So.2d 531, 534 (Fla.1995).[10]

A crucial ingredient necessary to constitute the offense of usury is the intent with which the act is done. See Lloyd, 29 U.S. at 224. Although "ignorance of the law will not protect a party from the penalties of usury where it is

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10. Although Plaintiff contends that Defendant's profit margin on OD fees exceeded the cost of processing overdrawn checks, resulting in deceptive and usurious practices, Plaintiff has "failed to show that [it was] deprived of a meaningful choice of banks with which [it] could do business and that the terms of the agreements with [Defendant] were unreasonably favorable to the bank." Jacobs v. Citibank, N.A., 61 N.Y.2d 869, 872, 474 N.Y.S.2d 464, 462 N.E.2d 1182 (N.Y.1984) (upholding summary judgment for the defendant bank in a suit attacking NSF check charges). Thus, Plaintiff has not portrayed itself as a "necessitous borrower."

committed . . . where there was no intention to evade the law" and the facts show that an unlawful rate of interest was "the result of mistake or accident, no penalty attaches." Id.

Penalties for the commission of usury are only imposed on lenders who "willfully" violate the statute. See § 687.04, Fla.Stat. To be willful, the act must proceed from "a conscious motion of the will, intending the result which actually comes to pass." Chandler, 146 So. at 552. As distinguished from inadvertent conduct, usury is "restricted to such acts as are done with an unlawful intent." Id. A determination of usury is not predicated on "whether the lender actually gets more than the law permits, but whether there was a purpose in his mind to get more than legal interest for the use of his money, and whether, by the terms of the transaction and the means employed to effect the loan, he may by its enforcement be enabled to get more than the legal rate." Id. (emphasis added); see also Dixon, 276 So.2d at 820-21 ("usury is largely a matter of intent, and is . . . determined by existence of corrupt purpose in the lender's mind to get more than legal interest for the money lent . . . [and] from the circumstances surrounding the entire transaction.").

Generally, the question of intent is one of fact. However, in this instance, where there is no conflict of material facts, the question is one of law for the Court. See, e.g., Atlantic Coast Line R.R. Co. v. Boone, 85 So.2d 834, 842 (Fla.1956); Richmond v. Florida Power & Light Co., 58 So.2d 687, 688 (Fla.1952); United States Rubber Prods. v. Clark, 145 Fla. 631, 200 So. 385, 389 (Fla.1941); Johnson v. Gulf Life Ins. Co., 429 So.2d 744, 746 (Fla. 3d DCA 1983);

see also Weingart v. Allen & O'Hara, Inc., 654 F.2d 1096, 1103 (5th Cir.1981) (citing Atlantic Coast Line R.R. Co., supra). Again, Plaintiff had the burden of proving Defendant had a "corrupt intent" to violate the usury statute at the time it honored the check and charged the OD fee, or alternatively, at the time it entered into the deposit agreement with Plaintiff.

Plaintiff has not produced even a scintilla of evidence that Plaintiff falls into that class of borrowers deemed necessitous or that Defendant took advantage of Plaintiff's condition in setting its OD fees. In this instance, it was Plaintiff who instigated the imposition of the OD fees. By maintaining sufficient funds in its account, Plaintiff could have avoided the payment of the OD fees. No one could have known at the inception of the banking relationship the total amount Plaintiff would be responsible for compensating Defendant for honoring checks presented against insufficient funds.

After carefully examining the record and the evidence proffered in support of Plaintiff's claim, the Court can find no demonstration of the necessary corrupt intent in Defendant's mind to get more than the legal rate of interest. Nor does the record reflect that this is a case of an overreaching lender taking advantage of a desperate borrower to impose undue or harsh terms. Thus, Plaintiff has failed to meet its burden of establishing a usury violation.

3. The Effect of a Usury Savings Clause

The absence of corrupt intent is further demonstrated by the express provisions in the deposit agreement. The

schedule of fees, incorporated into the deposit agreement, contained a contractual disclaimer of any intent to violate usury laws. In defining the relationship between the parties and their respective obligations for "Overdraft Balances," the agreement explicitly stated that:

> The following accounts are charged the NationsBank Prime Rate plus 3% (subject to the maximum rate permissible by law) for overdraft collected balances: Simple Analysis Business Checking. . . .

Defendant's Schedule of Fees (emphasis added).

A provision in a loan agreement which attempts to negate the effects of other provisions that might otherwise result in the extraction of an illegal rate of interest constitutes a "usury savings clause." See Jersey Palm-Gross, 658 So.2d at 534. Although the presence of a savings clause does not definitively insulate a lender against a usury violation, it can be considered as one factor in determining whether a lender possessed the intent to exact a usurious interest rate. See id. at 535.

In fact, some courts have acknowledged that "provisions in loan documents limiting the amount of interest payable to that authorized under applicable law have been recognized as valid and enforceable in this state and provide a complete defense to a charge of usury." First American Bank & Trust v. International Medical Centers, Inc., 565 So.2d 1369, 1374 (Fla. 1st DCA 1990), review denied, 576 So.2d 286

(Fla.1991).[11] Florida's Supreme Court has held that "savings clauses serve a legitimate function in commercial loan transactions and should be enforced in appropriate circumstances." Jersey Palm-Gross, 658 So.2d at 535. In affirming the lower court's determination regarding the efficacy of a savings clause, the court stated that "where the transaction is not clearly usurious at the outset but only becomes usurious upon the happening of a future contingency, the clause may be determinative on the issue of intent." Id. (citing Jersey Palm-Gross, Inc. v. Paper, 639 So.2d 664, 671 (Fla. 4th DCA 1994)).

The scenario described by the Florida Supreme Court for considering whether a savings clause negates the intent element of a usury violation mirrors the circumstances in the instant case. The savings clause in the deposit agreement implied that if the amount of interest charged against an overdrawn account ultimately resulted in a violation of Florida's usury laws, then the transaction would be recalculated and restructured to eliminate any usury violation, and any excessive interest already paid would be returned to Plaintiff.

In sum, Defendant's representation that charges for checks presented against overdrawn accounts would not exceed "the maximum rate permissible by law," and the fact

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11. Without discussing the law concerning usury savings clauses, the bankruptcy court for the Southern District of Florida held that while a savings provision "by itself is insufficient to avoid an adjudication of usury, it is credible evidence of the parties' intention that usurious interest not be present in the agreement." See In re Concrete Express, Inc., 87 B.R. at 719.

that the transaction was not usurious until an unanticipated contingency occurred, defeats any assertion by Plaintiff that Defendant possessed the intent to assess a usurious rate of interest. Absent proof of Defendant's corrupt intent, Plaintiff cannot avoid summary judgment on the issue.

III. Conclusion

The primary objective of the Bank Act was to enact a federal usury law for national banks. This measure, codified at 12 U.S.C. §§ 85 and 86, prescribes an interest rate ceiling and federal remedy for usury. It also protects national banks from discriminatory state usury laws under the "most favored lender" doctrine articulated by the U.S. Supreme Court. See Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409, 410, 21 L.Ed. 862 (1873). Discriminatory state usury laws are not at issue in this case.

Neither the Bank Act nor any other federal statute considers whether the provisions in contracts between banks and their customers may exact unreasonable or unconscionable fees. Plaintiff's preemption argument, consequently, is essentially an argument that even though the federal government has largely declined to regulate this area, Congress has nevertheless decided to preclude state regulation. The Court finds this argument is simply untenable.

The explicit language of the Bank Act does not speak to charges for processing checks presented against overdrawn accounts. The legislative history reveals no evidence of congressional intent to displace state law regarding charges

or payments other than for interest. Moreover, the Court is unable to find that Congress, when it used the phrase "interest at the rate" in enacting § 85 of the Bank Act, intended anything other than the ordinary and popular meaning of the word "interest." Thus, in the Court's view, § 85 does not preempt all state laws dealing with charges and fees not commonly included in the term "interest."

Another reason Plaintiff's claim must fail is that agreements to pay charges only in the event of a contingency are not usurious. Policy concerns illustrate that limiting the ability of banks to charge OD fees on checking accounts is inefficient because those individuals who cause the expense associated with such behavior would then be required to pay for the consequences of their conduct. Instead, banks would be forced to increase service and processing compensation in another manner. Many depositors who would be paying these increased amounts maintain sufficient funds in their accounts and do not cause overdrafts. Forcing banks to recover costs created by depositors, such as Plaintiff, from all depositors provides, in short, an economic subsidy for those who do not comply with the terms of their deposit agreements. This inequitable result would be exacerbated by the fact that the number of overdrawn accounts would increase as the costs to these depositors decrease.

In sum, as a matter of law, the Court finds that the payment of OD fees as consideration for honoring checks presented against overdrawn accounts is not the payment of interest under the deposit agreement. The OD fees at issue are the antithesis of a loan, by putting an end to credit instead of giving it. The manner by which Defendant computed the

amount of consideration for Plaintiff's right to overdraw its account does not affect its characterization as a usurious interest charge. Defendant was lawfully entitled to compensation for the services rendered for processing the checks and was a condition Plaintiff contractually agreed to pay.

Defendant has presented evidence in support of its contention that, in exchange for the imposition of the OD fee, it performed several processing functions other than those of a straight loan transaction. In the commercial context, the value of the services performed was clearly in excess of the amount necessary to remove any taint of usury. Plaintiff's business benefitted by Defendant's decision to honor the checks. In contrast, Plaintiff presented no evidence to show that the fee charged was unfair or unreasonable for the services Defendant performed and that the OD fee was not for services rendered as opposed to a hidden interest charge.

Moreover, the Court is unable to find a sufficient basis for Plaintiff's allegation that the OD fee was but a device to violate the statute condemning usury. Although neither party has pointed to any controlling case law specifically on point, the Court feels it is entirely proper to bear in mind not only the letter but the spirit of the usury law and its prime purpose to protect needy borrowers by penalizing unconscionable money lenders. See Chandler, 146 So. at 552.

Based on the foregoing, NationsBank's Motion for Final Summary Judgment is granted. Plaintiff, Video Trax, Inc.'s Motion for Summary Judgment is denied. As this Order disposes of all issues raised in this action, all pending motions are denied as moot.

APPENDIX C — OPINION OF THE DISTRICT COURT ON INITIAL MOTION TO DISMISS BELOW *VIDEO TRAX v. NATIONSBANK*, N.A. No. 97-1586 (S.D.Fla., FILED DEC. 22, 1997)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 97-1586-CIV-GOLD

VIDEO TRAX, INC., a Florida corporation on behalf of itself and all other persons and entities similarly situated,

Plaintiff,

vs.

NATIONSBANK, N.A., a National Banking Association,

Defendant.

ORDER DENYING MOTION TO DISMISS

THIS CAUSE came before the Court upon defendant Nationsbank, N.A.'s ("Nationsbank") Motion to Dismiss. Video Trax, Inc. ("Video Trax") brought this class action against Nationsbank, alleging that defendant's practice of charging certain overdraft fees in addition to periodic interest is violative of the usury provisions of the National Bank Act, 12 U.S.C. §§ 85, 86 (1994). Defendant contends that overdraft charges do not constitute "interest" within meaning of usury provisions of National Bank Act and therefore, there

is no legal basis for plaintiff's complaint. After careful consideration of the parties' arguments, the relevant case law and the record as a whole, this Court concludes that defendant's motion to dismiss should be denied.

I. Findings of Fact and Procedural Background

The following facts are gleaned from plaintiff Video Trax's Amended Complaint and are deemed to be true for purposes of this motion. On June 10, 1992, Video Trax opened an account at NCNB National Bank of Florida ("NCNB"), Nationsbank's predecessor. Video Trax entered into a depositor agreement with NCNB wherein Video Trax agreed in writing to pay an overdraft charge, a so called "Overdraft Item Fee," also termed a 'not sufficient fund fee' ("NSF"), whenever NCNB was presented with a check for payment that exceeded the balance of Video Trax's account.[1] The agreement provided that the overdraft charges were due whether or not NCNB decided to pay or dishonor the overdraft check.

At various times, Video Trax would draw checks that exceeded its account balance. Nationsbank would then determine whether to pay or dishonor each overdrawn check. In the event that Nationsbank paid the item, defendant would charge plaintiff an overdraft fee of $27.00, and in addition,

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1. Plaintiff contends that defendant charged an NFS fee whenever there was an overdraft and levied a separate fee, an overdraft item fee, if defendant honored the overdraft check. Defendant asserts that it charged one fee regardless of whether it honored the overdraft check. Resolution of this factual question, among others, is necessary prior to disposition of this matter.

would charge interest on the overdrawn amount calculated on the basis of the average daily overdrawn account balance. Even if Nationsbank refused to honor the check, however, defendant would charge plaintiff an NSF fee.

Plaintiff alleges that the periodic charges for interest, when aggregated with the overdraft fees, constitute "interest" in excess of the lawful amount allowed under the National Bank Act. Nationsbank assessed Video Trax "interest" charges in excess of $18,000, on an average annual overdraft balance of approximately $6,000, totaling over 300 percent in interest. Upon plaintiff's demand for the "excess interest," defendant refused to refund any monies, arguing that the NSF fees were not "interest" within the meaning of the usury provisions of National Bank Act. In examining the legal sufficiency of plaintiff's Amended Complaint, the Court must, therefore, determine whether the NFS fees constitute interest.

II. Standard for Motion to Dismiss

Dismissal of a complaint under Fed. R. Civ. P. 12(b)(6) is appropriate "only if it is clear that no relief could be granted under *any set of facts* that could be proved consistent with the allegations." *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (quoting *Hishon v. King and Spalding*, 467 U.S. 69, 73 (1984) (emphasis added). On a motion to dismiss, the court must accept all the alleged facts as true and find all inferences from those facts in the light most favorable to the plaintiff. *See, e.g., Cruz v. Beto*, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed. 2d 263 (1972); *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483 (11th Cir. 1994). The threshold of sufficiency

that a complaint must meet to survive a motion to dismiss is exceedingly low. *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) (citation omitted); *Jackum v. Hospital Corp. Of America Mideast*, 800 F.2d 1577, 1579 (11th Cir. 1983). The complaint should not be dismissed for failure to state a claim upon which relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sea Vessel, Inc. v. Reyes*, 23 F.3d 345, 347 (11th Cir. 1994) (citation omitted). But, to survive a motion to dismiss, a plaintiff may not merely "label" his or her claims. *Blumel v. Mylander*, 919 F.Supp. 423, 425 (M.D. Fla. 1996). Moreover, when, on the basis of a dispositive issue of law, no construction of the factual allegations of a complaint will support the cause of action, dismissal of the complaint is appropriate. *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir. 1991); *Powell v. United States*, 945 F.2d 374 (11th Cir. 1991); *Marshall County Bd. Of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1992).

III. Analysis and Discussion

The National Bank Act permits a national bank to charge "interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more." 12 U.S.C. § 85 (1994). Section 85, therefore, authorizes a national bank to charge interest allowed by the laws of the state in which the bank is located, incorporating those laws in order to determine what amount of interest the bank permissibly may charge. *Hunter v. Rich's Department Store*, 945 F.Supp. 1500, 1503 (N.D.Ala.1995). Section 86 provides a federal cause of action

for usury against a national bank that "tak[es], receiv[es], reserv[es], or charg[es] a rate of interest greater than is allowed by section 85 of this title." 12 U.S.C. § 86 (1994); see also *M. Nahas & Co. v. First Nat'l Bank*, 930 F.2d 608, 612 (8th Cir.1991) (remedy of § 86 completely preempts state-law usury actions against national banks); *Fisher v. First Nat'l Bank*, 548 F.2d 255, 257 (8th Cir. 1977) (interest rate a national bank may charge is ultimately a question of federal law); But see *Spellman v. Meridian Bank (Delaware), N.A.*, 1995 WL 764548 (3d Cir. Dec. 29,1995); *Copeland v. MBNA Am.*, 820 F.Supp. 537 (D.Colo. 1993).

Video Trax first argues that the NFS fees should be considered "interest" within the usury provisions of the National Bank Act. In support of this contention, plaintiffs cite cases applying the National Bank Act section 85 to charges other than straight interest charges.[2] More persuasive, plaintiff states that the Office of the Comptroller of the Currency ("OCC") has interpreted section 85 as applying to

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2. See *Citizens' Nat'l Bank v. Donnell*, 195 U.S. 369, 373-74, 25 S.Ct. 49, 49-50, 49 L.Ed. 238 (1904) (charges for failure to pay an account when due); *Northway Lanes v. Hackley Union Nat'l Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972) (closing costs charged on real estate loans); *Fisher v. First Nat'l Bank*, 548 F.2d 255, 258-59 (8th Cir. 1977) (cash advance fees on credit cards); *Cades v. H & R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994) (flat charges for tax refund anticipation loans); *Cronkleton v. Hall*, 66 F.2d 384, 387-88 (8th Cir.1933) (bonuses and commissions paid to a lender); *Panos v. Smith*, 116 F.2d 445, 446 (6th Cir.1940) (charges for mortgage taxes and recording fees); *American Timber & Trading Co. v. First Nat'l Bank*, 690 F.2d 781, 787 (9th Cir.1982) (compensating balance requirements).

late fees on credit cards issued by national banks,[3] which interpretation was upheld by the United States Supreme Court in *Smiley v. Citibank (S.D.), N.A.*, 116 S.Ct. 1730 (1996).

The *Smiley* Court unanimously held that the word "interest" in § 85 was ambiguous and that the Comptroller's judgment as to its meaning was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *Smiley*, 116 S.Ct. at 1732-33; *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297, 1301-1302 (8th Cir. 1996). The Court then concluded that the Comptroller's inclusion of credit card late fees within the meaning of "interest" was a reasonable interpretation of the statute. *Smiley*, 116 S.Ct. at 1735; see also *Hunter*, 945

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3. The interpretive ruling provides in relevant part:

> "The term "interest" as used in 12 U.S.C. 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports."

Interpretive Rulings, 61 Fed.Reg. 4849, 4869 (1996) (codified at 12 C.F.R § 7.4001(a)) (emphasis added).

F.2d at 1503; *Tikkanen v. Citibank, N.A.*, 801 F.Supp. 270 (D.Minn. 1992). Because the law of South Dakota, Citibank's home state, permitted banks to charge late fees, the determination that late fees are interest for National Bank Act purposes lead to dismissal of the state-law claims of Smiley, a California resident. See *Id.* at 1732; *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 313 (1978) (national bank may charge interest allowed by its home state even if such interest would not be allowed to bank in borrower's home state).

In the instant case, the Court is faced with a slightly different issue. The late fees at issue in *Smiley* arose from petitioner's relationship with the bank as a credit card holder, unambiguously an arrangement "for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended." 12 C.F.R. § 7.4001(a). A credit card holder fits neatly into the debtor role in a credit/debtor relationship, which is essential to invoke Section 85 of the National Bank Act. Here, the fees at issue stem from a deposit agreement between a bank and one or more of its depositors. Again, there exists a credit/debtor relationship, but here the roles are reversed: the bank is the debtor and the depositor is the creditor. *MJZ Corp. v. Gulfstream First Bank & Trust, N.A.*, 420 So.2d 396, 397 (Fla. 4th DCA 1982). There is, thus, a threshold question whether the overdraft fees in this matter are "connected with credit extension or availability," 12 U.S.C. § 7.4001(a), and accordingly, whether the usury laws apply at all.

Appendix C

Nationsbank argues that the deposit agreement with Video Trax does not establish a credit relationship, as Nationsbank is under no obligation to honor any particular check drawing on insufficient funds. Nationsbank also asserts that overdraft checks give rise to an NFS fee regardless of whether credit is extended to the bank customer, and in fact, the fees are earned prior to the time the bank decides to honor the overdraft check. The Court gives this argument short shrift, as Nationsbank assumed the role of creditor by honoring overdraft checks, even if, as it contends, defendant was not obligated to honor each and every overdraft check. More importantly, taking plaintiffs' allegations as true, defendant imposed a separate fee on its depositors when it honored an overdraft check than when it did not, and this demonstrates a connection between the fee charged and the extension of credit.

Nationsbank next argues that even if these fees are connected with the extension of credit, the fees should not be considered interest within the scope of section 85, as the bank earns the overdraft fees for entirely separate and distinct services than the benefits for which interest is charged. In support of this argument, defendant relies on *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285 (Tex. 1994).[4] *Tony's Tortilla Factory* stands for the proposition that NFS fees due to insufficient funds on deposit accounts do not qualify as interest and thus, these charges cannot be aggregated with periodic interest to determine whether the rate charged is usurious. Although the Court recognizes that

4. The Court notes that the Texas Supreme Court decided *Tony's Tortilla Factory* prior to the Supreme Court's issuance of *Smiley*.

as a creature of Texas Law, *Tony's Tortilla Factory* is not binding on this Court, that Court examined the issue now before this Court, and therefore, it bears detailed review. The following passage is instructive:

> In this case, there is no dispute as to the facts or character of the NSF fees. It is undisputed that each NSF fee was assessed as a processing fee for the additional work required in connection with handling the bad check. It is undisputed in the record that the decision to charge an NSF fee was a separate decision from the decision to honor or dishonor a bad check. There is no dispute that the NSF fee was charged to all customers, in the same amount, regardless of whether First Bank paid or rejected a check. It is undisputed that the amount of the NSF fee had no relationship to the amount of the funds advanced. The fact that the bank officers have authority to waive the NSF fee on occasion does not change the character of these fees. Thus, the NSF fee was not interest on the amount advanced to cover the bad checks. The NSF fees were charged for the costs of processing a check drawn on an account with insufficient funds. The mere profitability of the NSF fee to First Bank does not make the fee usurious interest.
>
> Each NSF fee was separate and additional consideration for processing each bad check. Thus, the NSF fee was for consideration other than the lending of money. Separate consideration was given to First Bank for the funds advanced to

> cover the bad checks. The separate consideration was not the NSF fee, but was Tony's implied promise to repay that advance. Based on these undisputed facts, we hold that, as a matter of law, the NFS fees charged in this were not interest." (Citations omitted).

Tony's Tortilla Factory, 877 S.W.2d at 285, 877.

This case demonstrates that there is a marked difference in a fee associated with the lending of monies, and that imposed to compensate the bank for a service performed. The difference is not between periodic interest charges and flat fees, both of which may qualify as interest according to section 85. *Greenwood Trust Company v. Commonwealth of Massachusetts*, 971 F.2d 818, 824-25 (1st Cir. 1992). Instead, the distinction is functional. To the extent that the fee compensates the lender for additional services provided, like the processing of an overdraft check, the fee is distinct from those imposed for credit services and is not interest. The *Smiley* Court also recognized this distinction: it is "quite possible and rational to distinguish, as the regulation does," between charges that are specifically assigned to the expenses of the bank in undertaking such activities as "processing an application, insuring a loan, or appraising collateral" and, on the other hand, charges "that are assessed for simply making the loan, or for the borrower's default."[5] *Smiley*, 116 S.Ct. at 1734; *Doe*, 107 F.3d at 1302.

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5. While 12 C.F.R. § 7.4001(a) defines interest as used in 12 U.S.C. § 85, 12 C.F.R. § 7.4002 provides that national banks may charge customers "non-interest charges and fees, including deposit account service charges."

Appendix C

Examination of the Florida Statutes, Section 655.954 further highlights the difference between finance charges, whether periodic interest charges or flat fees, and fees for "processing an application, insuring a loan, or appraising collateral."[6] Section 655.954 of the Florida Statutes applies to "a credit card or overdraft financing arrangement," and defines interest as "those charges considered a finance charge under the federal Truth in Lending Act." The Truth in Lending Act ("TILA") excludes overdraft fees from the definition of "finance charge," unless, unlike the present case, the bank had agreed in advance to pay any overdraft items pursuant to a credit agreement.[7] 12 C.F.R. § 226.4(c)(3).

---

6. Section 655.954 provides in relevant part:

"Financial institution loans; credit cards.

(1) Notwithstanding any other provision of law, a financial institution shall have the power to make loans or extensions of credit to any person on a credit card or overdraft financing arrangement and to charge, in any billing cycle, interest on the outstanding amount at a rate that is specified in a written agreement, between the financial institution and borrower, governing the credit card account."

7. 12 C.F.R. § 226.4 provides in relevant part:

"(a) Definition: The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.

(Cont'd)

See also *Taylor v. Union Planters Bank of Southern Mississippi*, 964 F.Supp. 1120, 1123-24 (S.D.Miss. 1997) (dismissing cause of action under Regulation Z and TILA by checking account holders for the imposition of five dollar, daily overdraft fee, holding that such fee did not constitute a finance charge under TILA);[8] accord *Sims v. Union Planters Bank of Northeast Mississippi*, 3:96cv206-B-A, 1997 WL 170309, at *2 (N.D.Miss. Feb. 27, 1997).

Despite the breadth of the definition afforded the term "interest" by the *Smiley* Court, the ordinary definition of "interest" also does not appear to include fees for additional services associated with processing overdraft checks.

(Cont'd)

(c) Charges excluded from finance charge:

> (3) charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing."

8. The facts in *Taylor* are also instructive. The basis of the plaintiffs' complaint in *Taylor* was a daily overdraft fee imposed by Union Planters in the amount of $5.00 that was deducted upon the presentation of a check on an account that was overdrawn or became overdrawn because of the payment of a check. Union Planters had discretion in determining whether or not the check should be paid. The fee was charged to the account for each day that the account continued to be overdrawn. Union Planters treated every customer identically, charging each customer's account for this daily overdraft fee when a customer's account was overdrawn. In addition, plaintiffs in *Taylor* admitted that a one-time $20 fee imposed by the bank for presentation of an overdrawn check, regardless of whether the bank paid the check or not, was not a finance charge.

See Black's Law Dictionary 812 (6th ed. 1990) ("Interest is the compensation allowed by law or fixed by the parties for the use or forbearance of borrowed money."); *Smiley*, 116 S.Ct. at 1735 (interest is " 'compensation which is paid by the borrower to the lender or by the debtor to the creditor for . . . use [of money]' ") (quoting 1 J. Bouvier, A Law Dictionary 652 (6th ed. 1856)).

On this motion to dismiss, however, the record is bare as to many of the facts deemed critical to the Texas Supreme Court in determining that the fee there was not interest. As such, defendant has failed to demonstrate that the NSF fee here is of the same character as the fees examined in *Tony's Tortilla Factory*.

Accordingly, it is

ORDERED AND ADJUDGED that defendant's Motion to Dismiss [D.E. #22] be, and it is hereby DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 19 day of December, 1997.

s/ Alan S. Gold
ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

APPENDIX D — TEXT OF 12 U.S.C. § 85; 12 U.S.C. § 86; 12 C.F.R. § 7.4001 AND 12 C.F.R. § 7.4002

12 U.S.C. § 85

§ 85. Rate of interest on loans, discounts and purchases

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the

United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

* * *

12 U.S.C. § 86

§ 86. Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred.

* * *

Appendix D

12 C.F.R. § 7.4001

§ 7.4001 Charging interest at rates permitted competing institutions; charging interest to corporate borrowers.

(a) Definition. The term "interest" as used in 12 U.S.C. 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability: numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, annual fees, cash advance fees, and membership fees. It does not ordinarily include appraisal fees, premiums and commissions attributable to insurance guaranteeing repayment of any extension of credit, finders' fees, fees for document preparation or notarization, or fees incurred to obtain credit reports.

(b) Authority. A national bank located in a state may charge interest at the maximum rate permitted to any state-chartered or licensed lending institution by the law of that state. If state law permits different interest charges on specified classes of loans, a national bank making such loans is subject only to the provisions of state law relating to that class of loans that are material to the determination of the permitted interest. For

example, a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company, without being so licensed, but subject to state law limitations on the size of loans made by small loan companies.

(c) Effect on state definitions of interest. The Federal definition of the term "interest" in paragraph (a) of this section does not change how interest is defined by the individual states (nor how the state definition of interest is used) solely for purposes of state law. For example, if late fees are not "interest" under state law where a national bank is located but state law permits its most favored lender to charge late fees, then a national bank located in that state may charge late fees to its intrastate customers. The national bank may also charge late fees to its interstate customers because the fees are interest under the Federal definition of interest and an allowable charge under state law where the national bank is located. However, the late fees would not be treated as interest for purposes of evaluating compliance with state usury limitations because state law excludes late fees when calculating the maximum interest that lending institutions may charge under those limitations.

(d) Usury. A national bank located in a state the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by a corporate borrower.

Appendix D

12 C.F.R. § 7.4002

§ 7.4002 National bank charges.

(a) Customer charges and fees. A national bank may charge its customers non-interest charges and fees, including deposit account service charges. For example, a national bank may impose deposit account service charges that its board of directors determines to be reasonable on dormant accounts. A national bank may also charge a borrower reasonable fees for credit reports or investigations with respect to a borrower's credit. All charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers.

(b) Considerations. The establishment of non-interest charges and fees, and the amounts thereof, is a business decision to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. A bank reasonably establishes non-interest charges and fees if the bank considers the following factors, among others:

(1) The cost incurred by the bank, plus a profit margin, in providing the service;

(2) The deterrence of misuse by customers of banking services;

(3) The enhancement of the competitive position of the bank in accordance with the bank's marketing strategy; and

(4) The maintenance of the safety and soundness of the institution.

(c) Interest. Charges and fees that are "interest" within the meaning of 12 U.S.C. 85 are governed by § 7.4001 and not by this section.

(d) State law. The OCC evaluates on a case-by-case basis whether a national bank may establish non-interest charges or fees pursuant to paragraphs (a) and (b) of this section notwithstanding a contrary state law that purports to limit or prohibit such charges or fees. In issuing an opinion on whether such state laws are preempted, the OCC applies preemption principles derived from the Supremacy Clause of the United States Constitution and applicable judicial precedent.

(e) National bank as fiduciary. This section does not apply to charges imposed by a national bank in its capacity as a fiduciary, which are governed by 12 CFR part 9.

Supreme Court, U.S.
FILED
JUL 13 2000
CLERK

No. 99-2000

In The

Supreme Court of the United States

VIDEO TRAX, INC.,

Petitioner,

v.

NATIONSBANK, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Put simply, the only question in this case is whether a bad check processing fee charged by a bank to a customer's deposit account constitutes interest for purposes of usury law. Indeed, both the district court (in the first paragraph of the "Analysis and Discussion" section of its final order) and the Eleventh Circuit (which expressly adopted the district court's analysis in its opinion) have specifically recognized that the sole question in this case is whether a one-time, fixed-amount, per item fee charged to Video Trax whenever it wrote a bad check on its account with NationsBank constituted interest under 12 U.S.C. §85, 12 C.F.R. §7.4001(a), and Florida's usury statute. As the district court stated:

> The parties agree that the sole issue for determination is whether the OD fee [i.e., the Overdraft Item Fee on checking accounts charged by the bank for checks drawn in excess of the collected balance in a depositor's account] was really "interest" [pursuant to 12 U.S.C. §85, 12 C.F.R. §7.4001(a), and Florida's usury statute Sections 687.01 et seq.] that, when aggregated with the interest charged on the average daily overdrawn balance, was usurious.

See Petitioner's Appendix B at 11a and Appendix A at 2a.

RULE 29.6 STATEMENT

NationsBank, N.A., n.k.a. Bank of America, N.A., a national association formed under the laws of the United States, is a wholly-owned, direct subsidiary of NB Holdings Corporation, a private company incorporated under the laws of the state of Delaware. NB Holdings Corporation is in turn wholly-owned by Bank of America Corporation, a public company incorporated under the laws of the state of Delaware. To the best of our knowledge, there is no publicly held company that owns 10% or more of Bank of America Corporation's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. The District Court's Statement Of Facts As Accepted By The Eleventh Circuit 1

B. Video Trax's Factual Misstatements 2

REASONS FOR DENYING THE WRIT 16

A. There Is No Conflict With *Smiley* 18

B. There Is No Conflict With Any Decision By Any Court Of Appeals Or Other Court 20

C. The Issue In This Case Is Essentially A Simple State Usury Law Question 21

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Beech v. Trust Mark National Bank, No. 97 CV 187 GR (S.D. Miss. Jan. 13, 1998) 17, 19

First Bank v. Tony's Tortilla Factory, 877 S.W. 2d 285 (Tex. 1994) 17

Johnson v. Fleet Finance, Inc., 4 F.3d 946 (11th Cir. 1993) 26

Nicolas v. Deposit Guaranty National Bank, 182 F.R.D. 226 (S.D. Miss. 1998) 17, 18, 19, 21, 22

Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996) 18, 19, 20, 22

Terrell v. Hancock Bank, 7 F.Supp.2d 812 (S.D. Miss. 1998) 17, 19

STATUTES & RULES

12 C.F.R. §7.4001 ..... 23, 24

12 C.F.R. §7.4001(a) 19, 20, 22, 23

12 C.F.R. §7.4001(b) 24

12 C.F.R. §7.4001(c) 22, 23

12 C.F.R. §7.4002 ..... 13, 15

12 C.F.R. §226.4 25

12 C.F.R. §226.4(c)(3) 26

12 U.S.C. §85 22

15 U.S.C. §1601 25

61 Fed. Reg. 4,849 (1996) 22, 24

TABLE OF AUTHORITIES – Continued

Page

61 Fed. Reg. 4,858 (1996) 22, 24, 25

Section 655.954(1), Florida Statutes 25, 26

Section 655.954(2), Florida Statutes 25, 26

Section 674.303(2) 13

Section 687.01, Florida Statutes i

OTHER

Clark, Barkley, *The Law Of Bank Deposits, Collections and Credit Cards* (Rev. Ed. 1999) 17, 20

STATEMENT OF THE CASE

Plaintiff has sought by this action to radically alter the present fee structure imposed on bank customers when they write bad checks on their checking accounts, a structure that has been approved by all federal banking regulators and employed by virtually all financial institutions in the United States for a substantial period of time. Accepting plaintiff's argument would work a fundamental change in the American banking system and substantially disrupt the regulation of bank fees by the Office of the Comptroller of the Currency. As the OCC itself explained in an *amicus* brief to the Eleventh Circuit, plaintiff's argument – that the bad check fee charged for an overdraft item in a deposit account is a subterfuge to exact a usurious rate of interest – is contrary to established federal regulations that govern bank fees. A complete copy of the OCC's brief is appended.

A. The District Court's Statement Of Facts As Accepted By The Eleventh Circuit

The final order of the district court very concisely states the pertinent, undisputed facts of this case. In essence, the judge explains that NationsBank has a unified bad check processing system which, pursuant to the account agreement, immediately posts to the bank's general ledger accounts a due and owing, one-time, fixed-amount, per-item bad check processing fee for each and every check in any amount presented to the bank in excess of a customer's account balance. This fee is imposed whether or not such a check is ultimately honored or returned and regardless of the name ultimately

assigned to the fee when it is subsequently posted on the individual customer's account statement, that is, whether it is called an "OD" fee for checks that are paid or an "NSF" fee for checks that are not paid and returned. As the judge's summary of undisputed facts clearly establishes, the fee does not bear any of the normal indicia of "interest."

The Eleventh Circuit's opinion accepts this factual rendition of the district court by expressly noting that the "facts and procedural history are set out in the district court's opinion." *See* Petitioner's Appendix A at 2a. NationsBank, therefore, similarly adopts the district court's statement of facts in its entirety. That statement is reproduced in Petitioner's Appendix B at 4a-8a.

B. Video Trax's Factual Misstatements

Video Trax attempts to paint a different factual picture than the district court by the use of artful omission. Video Trax gives this Court only bits and pieces of the discovery taken in this case, ignoring undisputed evidence which demonstrates the faulty nature of its claim. Each of the objective facts presented by Video Trax (although not its characterizations of those facts) may be true, but the overall picture created by Video Trax's selective omission of other relevant facts is totally inaccurate. That is, Video Trax has created a statement of facts by adding a "spin" to the facts it has carefully selected out of the body of discovery in this case. The undisputed facts of record in this case, however, establish that the district judge correctly entered summary judgment in favor of

NationsBank and against Video Trax and that the Eleventh Circuit correctly affirmed. The following is a point-by-point reply to the most egregious factual omissions and mischaracterizations contained throughout Video Trax's brief:

(1) Misstatements based upon selective consideration of facts in the record:

(a) Plaintiff's Assertion: *The account agreement did not provide for a flat fee whenever a check exceeded the account balance.*

Video Trax ignores the express provision in the NationsBank Deposit Agreement making fees applicable to its checking account pursuant to the bank's Business Schedule of Fees. This itemized fee schedule clearly provides a single, all-inclusive fee for any type of check in excess of a customer's account balance. It reads: "Overdraft check, insufficient funds, unavailable funds, per item . . . $27." Quite clearly, a portion of the NationsBank agreement ignored by plaintiff *does* provide for a flat fee.

(b) Plaintiff's Assertion: *The NSF and OD charges are separate designated fees.*

Video Trax ignores the unequivocal, unrebutted testimony of Karin Hirtler-Garvey, the Comptroller of NationsBank, that the bad check processing fee is an up-front, uniform, per item processing fee automatically posted to the bank's general ledger immediately upon determination by the bank's computer that a customer's account does not have sufficient funds to cover a check presented for payment. In her deposition, she specifically states:

Q. Are there certain accounts that NSF fees are booked into versus overdraft fees or are they in some manner booked together?

A. I think they are together.

Q. Do you know why they are booked together?

A. We don't think of them differently from an accounting perspective.

Q. Why not?

A. Because they are the same. They are a fee and the fact is that someone wrote a check and didn't have money to cover it.

. . . .

Q. Do you know at what point in the processing of an overdraft check the overdraft fee is assessed?

A. Immediately when the system does the math [i.e., compares the amount of the check to the customer's account balance] and determines this has been an overdraft the fee is charged.

The deposition testimony of David Duvall, a NationsBank officer upon whom plaintiff relies, is precisely the same:

Q. Paragraph 6, you say, "The NSF/OD per item fee set forth in the business schedule of fees as described above is a check-processing fee charged whenever a check or other debit is presented to the bank that creates a potential overdraft situation." How do you know that?

A. Because we handle the OD and NSF items exactly the same way.

> Q. Well, you charge it based on different criteria, correct?
>
> A. The path that the check takes is exactly the same. The handling of that check is exactly the same, which is why the fee is the same.

The facts set forth in this testimony establish that the NSF and OD fees are not "separate designated fees," as the plaintiff argues, but, rather, the same bad check processing fee which is posted to a single general ledger account at the very outset of processing a bad check. The names "NSF" and "OD" are added afterward for the purpose of identifying on customer account records (as opposed to the bank's general ledger) whether a particular bad check was honored or returned. Video Trax has focused solely on the end of the bad check handling process and ignored all that goes before. Video Trax has the tail wagging the dog.

Video Trax is simply playing a name game in an attempt to create a distinction that does not really exist. Whether labeled as an NSF fee or an OD fee, a bad check processing fee is actually a processing fee charged by banks for handling a check written and presented for payment that exceeds the balance in the customer's deposit account, which fee is charged regardless of whether the item is honored or returned. Video Trax is attempting to take advantage of the fact that there is no consistency in the naming of this fee by different banks and organizations. The OCC refers to it as the "NSF fee" or "bad check processing fee." It could also be called an overdraft check processing fee, an overdraft item ("OD") fee, a non-sufficient funds ("NSF") fee, an NSF/OD fee, a presentment fee, or some other name. (Unfortunately, and

even more confusingly, some of the same terms are also used in an entirely different context to describe fees charged by a creditor when a credit card holder attempts to pay the monthly statement with a bad check.)

In this case, NationsBank's business schedule of fees applicable to Video Trax's checking account simply identifies the bad check processing fee in a single line item as: "Overdraft check, insufficient funds, per item. . . . $27." The bank labels this fee an "OD" or "NSF" fee on customer deposit account records (as opposed to general ledger accounting records) merely to identify for the customer and the bank the decision made by the bank on how the item was ultimately treated (i.e., honored or returned). There is in fact, however, only one bad check processing fee.

(c) Plaintiff's Assertion: *The process by which the OD fee was assessed is functionally different than the process where an NSF fee was assessed.*

In making this assertion, plaintiff ignores the indisputable fact that NationsBank has only one, integrated bad check processing system which charges exactly the same fee for processing each and every bad check, regardless of whether it is honored or returned. NationsBank's treatment of all bad checks begins at the same starting point. All bad checks then flow through the same system. Indeed, the whole point of the system, which employs a single exceptions processing computer program known as Vector 5, is to allow bank officers to evaluate on a daily basis each bad check for each customer for the singular purpose of reaching an ultimate decision on whether to return or honor each such check.

It is not actually possible to strip away those parts of the system involving return (NSF) checks and to focus only on overdraft (OD) checks that are honored (i.e., to disintegrate the system) as Video Trax has attempted to do.

At the very outset of this integrated processing system, the bank imposes one, flat, per-item processing fee for each bad check right up front. During the entire process, the fee for any one bad check can, at any time, readily be labeled, or relabeled, as "NSF" or "OD" until a final decision is made on whether the check for which the fee has been imposed is honored or returned at the end of the governmentally mandated clearing time. The fact that the fee is given a different name when the bad check is honored (OD) than the name used when the bad check is returned (NSF) does not convert the processing fee into interest. Plaintiff is engaged in nothing more than a game of semantics, picking out only those portions of the system containing the words "overdraft" or "OD" and ignoring the existence of the rest of system. Plaintiff attempts to elevate the importance of names over substance.

(2) Mischaracterization of facts about the bad check processing system:

(a) Plaintiff's Assertion: *A flow chart shows that the fee is assessed on bad checks only after the credit decision is made, thereby making it a fee charged "in connection with" an extension of credit.*

Video Trax has failed to read the entire flow chart. The chart (which, in any event, its author – Roland Rodriguez – testified was prepared for purposes entirely unrelated to the issue of when or how an overdraft fee would be charged) in fact shows on its face that the bad

check fee is always charged whether the check is paid or returned. This is clearly demonstrated in the decision box at the bottom center of the flowchart into which *all* bad check decisions flow and in which the ultimate question "Item Paid?" is posed.

Moreover, the chart actually uses the same terminology whether the check is honored or returned. The chart indicates that if the answer to this question ("Item Paid?") is "yes," i.e., if the bad check is honored, then an "OD fee is assessed." But the chart also indicates that if the answer is "no," the item is not honored, i.e., if the bad check is returned, then, nevertheless, the same "OD fee is assessed." That is, the flowchart uses the same "OD fee" terminology regardless of whether the item is returned or honored. There is no reference whatsoever in the flow chart to an "NSF fee." This undermines the semantics game being played by Video Trax.

It is true, of course, as Rodriguez admitted in his deposition, that when NationsBank ultimately posts the bad check processing fee to a customer's account record (after it has already posted the fee to its general ledger as an earned fee), it labels the fee "NSF" on the customer's records if the bad check was returned and "OD" if the bad check was honored. This allows the bank and the customer to quickly identify whether the bad check for which the processing fee was charged was honored or not. Rodriguez was not, however, attempting to resolve the lack of consistency in nomenclature for bad check processing fees utilized not only by banks but also by the OCC and other federal bank regulators. Indeed, his use of names on the chart accurately reflects the reality that

there is, in fact, only one bad check processing fee involved in this case.

(b) Plaintiff's Assertion: *The bank's process for deciding whether to pay an item includes a matrix that permits the extension of an "unofficial line of credit," thereby allowing a check to be processed without any additional cost to the bank.*

This is yet another mischaracterization by Video Trax. It is premised upon plaintiff's false labeling of the matrix as a "credit-scoring model" designed to increase the number of checks honored to increase fee income. Such description, however, ignores the only testimony directly on point, given by Duvall, that the matrix is part of the bad check processing system and not part of any credit analysis. Indeed, as Duvall explains, the factors considered by the matrix are not anywhere near sufficient to constitute a credit model or to serve as a valid basis for making loan decisions. No reasonable banker would make traditional loan decisions on such limited information. In fact, the most obvious aspect of the matrix is that it starts recommending dishonor of a customer's bad checks after only one or two prior bad checks *in any amount* have been allowed to clear in the course of a year. (The Video Trax account was an unusual situation in which the branch manager frequently overrode the matrix because of repeated pleas by its owner, Rene Elalouf, to accommodate him, a fellow tenant in the same shopping center.) In fact, all bad checks go through the same, expensive review system. The bank recovers this expense by charging a fee to the customers who submit bad checks to the bank. No bad check is exempt from the

process or from the initial imposition of the bad check fee. It is true Duvall made the point in his deposition that there is no difference in cost to process a bad check whether it is ultimately honored or returned, i.e., there is no additional cost to process a check that is honored (an "OD" check) than there is to process a check that is returned (an "NSF" check). This does not, however, mean that processing a bad check is costless. It simply means that the processing cost is the same whether the check is honored or returned.

Video Trax's mischaracterization ignores the observations in the report published by Earnings Performance Group, upon which plaintiff places such great reliance, that (1) the matrix was primarily laborsaving because bank officers were in fact already allowing a certain number of bad checks to clear as an accommodation to customers, thus saving the effort of having to constantly reverse return decisions while not excessively increasing the number of items ultimately honored; and (2) the extra fee income would be generated not so much because more checks were honored (the same fixed fee being charged whether the check is returned or honored) but rather because bank officers would be required to affirmatively act to *waive* the fee instead of allowing automatic up-front blocking of the fee as in the past.

Video Trax's repeated reference to the matrix as an "unofficial line of credit" is taken from this EPG report, a document prepared by consultants to NationsBank, not by the bank itself (which report, tellingly enough, is entitled "*Noninterest* Income Project"). Plaintiff does attribute the phrase to EPG, but in a carefully ambiguous

way (by reference to "a report generated for NationsBank"). Video Trax is fully aware that no one at the bank (and no testimony in this case) accepts EPG's characterization of the matrix, and, indeed, Video Trax knows that the bank's representative in this case, Duvall, expressly takes issue with the characterization because, as he testified, a bank line of credit would only be created by consideration of many more factors than contained in the matrix. Once again, Video Trax is playing with words to reach an unjustified and incorrect conclusion.

(c) Plaintiff's Assertion: *Pay-to limits are not part of the bad check processing system, thus making them like a line of credit.*

Once again, Video Trax's characterization rests upon a false assumption. The "pay-to" limit, which NationsBank also refers to as an "officer assigned limit," is a part of the bad check processing system just as much as the matrix, all of which, of course, costs the bank substantial sums of money to maintain and operate. By use of the pay-to option, a relationship officer can instruct the computer used in the bad check processing system to make a tentative decision to pay bad checks for a certain customer up to a certain limit, after which the computer will tentatively decide to return such items. The purpose is to allow relationship officers greater flexibility than allowed with the matrix. Each tentative pay-to limit decision by the computer, like each matrix decision, requires subsequent evaluation by a bank officer on a daily basis, and any computerized recommendation can be overridden by the appropriate bank officer. The pay-to limit can be eliminated by a relationship officer at any time, especially because there is no agreement with the customers to use

this option and, in fact, customers are not even informed about the limit. This has no factual similarity to a credit arrangement.

Significantly, the record in this case contains no evidence as to how often the pay-to limit is used by the bank. Indeed, there is no evidence that it is ever used, even though it exists as a potential option programmed into the bad check processing system. Duvall answered Video Trax's questions regarding this option on a hypothetical basis, not stating what actually happens at the bank. It is clear, however, that Video Trax's account did not use the pay-to option and that usage of this option, if at all, is highly limited and requires special authority to implement. As the manager of the branch at which Video Trax maintained its account has testified, she had "no authority" to set such overdraft limits. The matrix is by far the dominant, if not the exclusive, aspect of the automated part of the bad check processing system.

Moreover, there is no evidence in the record to establish that the bank itself would consider any use of a pay-to option to be an "unofficial line of credit," as Video Trax concludes. In any event, the mere existence of the pay-to option for the use of certain bank managers in rare circumstances, especially because the customers would have no knowledge of its use, does not in any way convert the system involved in this case from a bad check processing system to a credit system.

(3) "Red herring" arguments that the "OD" fee constitutes interest:

(a) Plaintiff's Assertion: *NationsBank increased income through its application of service charges.*

This is irrelevant to the issue of whether such fees constitute interest. The fees are permitted under federal regulations and the Uniform Commercial Code. *See* 12 C.F.R. §7.4002; Section 674.303(2), Florida Statutes. Moreover, as Duvall pointed out in his deposition, planning for generation of income through bad check processing fees is no different than the City of Miami projecting income based upon speeding tickets.

(b) Plaintiff's Assertion: *The functional steps for processing an NSF check are different than for processing an OD check.*

This is irrelevant. Of course the procedures for handling bad checks are different after the bank has made a decision on whether to honor the item and label the bad check fee either an "OD" fee or an "NSF" fee, but there is in fact only one bad check processing system. Moreover, at any given moment after a bad check enters the system, it could be labeled as an honored (OD) item but in the very next moment it could just as readily be switched to be a return (NSF). For example, the bank's computer might tentatively identify a particular check as one to be honored based upon parameters set forth in the matrix, only to have that decision quickly overridden by a bank officer who decides to dishonor the check based upon other factors not considered by the computer. To focus on only those portions of the system containing the words "overdraft" and "OD," as plaintiff has done, completely misses at least half of the system. At the very end of the

process, the bad check is either returned or honored, but that is the very point of the entire system – to determine how to treat each bad check. There is only one process involved in this case, an integrated bad check processing system, and only one fee charged, regardless of how the check is categorized or labeled.

(c) Plaintiff's Assertion: *The bank sought to encourage rather than discourage customers to write bad checks to increase fee income.*

Video Trax's statement ignores the unrebutted evidence not only establishing the bank's intent to discourage bad checks by the fee but also demonstrating that the fee actually had the desired deterrent effect on Video Trax itself. Duvall specifically testified that NationsBank's bad check processing system and the bad check fee are intended to, and do, discourage overdrafting. Debbie Rowe, the branch manager where Video Trax had its account, testified that she took steps to discourage overdrafting, which included a refusal to waive the bad check processing fee except in situations where a customer had made a one-time mistake that was not likely to recur. Rowe even testified that she believed the imposition of numerous bad check processing fees (for both returned and honored checks) should have deterred Video Trax, for whom a special favor was being done. (This case comes within the ambit of the maxim: "No good deed shall go unpunished.")

In fact, the fees charged to Video Trax ultimately did have a deterrent effect. As Elalouf, one of the two owners of Video Trax testified, he was initially in charge of the plaintiff's checking account but that he is a "PR" man basically unconcerned with financial matters (including

his own personal accounts). He continued to write checks without knowing at any particular time whether he had sufficient funds in the company's account. He never bothered to open, let alone review, the monthly bank statements. He just wrote checks without much regard for the account balance even though he knew a bad check fee was being imposed for each check in excess of the account balance. (Significantly, Elalouf testified that he knew about the fee and how much it was at the time he opened the account based upon a document given to him at the time. He further testified that he received notices from the bank for each bad check imposing a fee "always in the same amount" regardless of whether the check was honored or returned.) As a result of his behavior, plaintiff incurred many bad check fees but did not pay any attention to them. When his partner, the "finance" man, finally reviewed all the bank statements, he saw the frequent overdrafting, added up the fees, and then promptly instituted controls to stop all overdrafts, including a requirement that both men sign all checks drawn on the company's account. From that point on, Video Trax, now a customer of another bank because NationsBank closed the Video Trax account, stopped presenting bad checks.

The record in this case undisputedly establishes that Video Trax was not a necessitous borrower who desperately needed money. Rather, it had a checking account that it negligently managed. There can be no doubt that in this case, the bad check processing fees ultimately had the deterrent effect desired by the bank and specified by the OCC in 12 C.F.R. §7.4002 as a fundamental justification for the existence of the fee. Discipline was finally imposed on the use of the company's checking account.

(d) Plaintiff's Assertion: *The opinion of Video Trax's expert supports its arguments.*

In short, bad facts lead to bad conclusions. The affidavit of Gene Coney offered by Video Trax does not purport to give any firsthand information regarding the NationsBank bad check processing system. All he offers is opinion based upon the information given to him by Video Trax. Indeed, his affidavit contains exactly the same arguments as the memoranda Video Trax submitted to the courts below, and it is a transparent attempt to give plaintiff's arguments some air of authority in light of the complete absence of case law to support them. Coney's opinions, like those of Video Trax, are deficient because they rely upon the plaintiff's highly selective view of the facts. Coney draws his conclusions without consideration of the NationsBank system for posting the standard, uniform bad check fee and without reference to the half of the system that handles "NSF" items. Because he analyzed only the "OD" side of the system, and misconstrued the OCC's regulations, Coney's conclusions, like those of Video Trax, cannot possibly be correct. Bad check processing fees, whether labeled "OD" or "NSF" are not interest.

REASONS FOR DENYING THE WRIT

The bad check processing fee at issue in this case, whatever name it might bear, is not usurious because it is not "interest" within the meaning of either federal or state law. As a highly respected commentator on bank law has concisely stated: "[C]harges that are imposed

whether a check is paid or bounced are not 'interest' for state usury law purposes. Instead, they are 'service fees.' This is the clear holding of all [the] cases that have looked at the issue. It is also the clear position of the OCC, to which the courts must defer. Most important, it is the only conclusion that makes sense." Barkley Clark, *The Law Of Bank Deposits, Collections And Credit Cards*, ¶3.01[4][b], at 3-49 (Rev. Ed. 1999).

Try as Video Trax might to deny it, the material facts in all of the previous cases deciding the present issue are the same as in this case: (1) the same dollar amount of fee was imposed whether or not the bank chose to honor the plaintiff's checks; (2) overdraft checks were not always honored, with a majority of the overdraft items being returned; (3) the fee was not compensation for any default or breach by the plaintiff of a condition upon which credit was extended; (4) presenting an overdraft item to the bank was not a breach of, or default on, the deposit agreement but, rather, an anticipated event for which plaintiff agreed to pay a flat, one-time, per-item bad check processing fee pursuant to the terms of the deposit agreement. *See First Bank v. Tony's Tortilla Factory*, 877 S.W. 2d 285 (Tex. 1994); *Nicolas v. Deposit & Guaranty National Bank*, 182 F.R.D. 226 (S.D. Miss. 1998); *Terrell v. Hancock Bank*, 7 F.Supp. 812 (S.D. Miss. 1998); *Beech v. Trust Mark National Bank*, No. 97 CV 187 GR (S.D. Miss. Jan. 13, 1998) (a copy is contained in the record below).

In its analysis of those cases, Video Trax misstates the factual record upon which the cases were decided. NationsBank explained every one of those misstatements in detail to both the district court and the Eleventh Circuit in the present case, including the filing of certified

copies of portions of the record in the *Nicolas* case before the Southern District of Mississippi. Thus, as a matter of both fact and law, the present decision does not conflict with any prior decisions on point, and it fully comports with both common sense and all current banking rules, regulations, and statutes.

A. There Is No Conflict With *Smiley*.

This Court's decision in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), involved a credit card account. The present case involves a checking account, which is a deposit account rather than a credit account. The NSF, overdraft, and overlimit fees referenced in *Smiley* are the types of fees charged to a holder of a credit card who attempts to repay the outstanding balance on his card with a bad check or who exceeds the established credit limit on his card. The NSF or OD fee in the present case is the type charged to a deposit account customer who tries to take more money out of a checking account than it has on deposit. Although the names of the fees are confusingly similar, they are fundamentally different types of fees because the underlying transactions are fundamentally different. The *amicus* brief of the OCC filed with the Eleventh Circuit (and appended to this brief) clearly makes the distinction and explains the different regulations governing the two different types of transactions. *See* OCC Brief at 6-7 and Exhibit 1. This answers the "fundamental" question posed on page 22 of petitioner's brief: "What could the Comptroller of the Currency, in his rule-making posture, have been referring

to when it referred to 'over limit' fees within the context of 12 C.F.R. §7.4001(a)?"

In addition to focusing on an entirely different transaction than involved in the present case, *Smiley* also involved a diametrically opposite regulatory situation. In *Smiley*, state law *prohibited* the fee at issue, and federal law was held to pre-empt that prohibition so the fee could be exported by the national bank from the state in which it was located (and which did not prohibit the fee) into the prohibiting state where the bank wanted to do business. In the present situation, state law does *not* prohibit the fee, so federal law – consistent with the principle of allowing national banks to have the same advantages as state banks as set forth in Section 85 of the National Bank Act – also does not prohibit the fee.

Every court, including the district court below, that has directly considered the matter recognizes that *Smiley* does not control the situation in this case. *See Nicolas*, 182 F.R.D. at 231; *Terrell*, 7 F.Supp. at 817 n.1; *Beech*, 97 CV 187 GR at 7-8. The most current commentary on the matter also recognizes that the situation and holding in *Smiley* is irrelevant to the present case:

> *Smiley* held that late-payment fees imposed against delinquent bank credit cardholders constitute "interest" for purposes of allowing "exportation" of interest rates from the bank's home state to other states where cardholders reside. 12 C.F.R. §7.4001(a) codifies the *Smiley* decision by defining the term "interest" to include late-payment fees and NSF fees. However, as the OCC pointed out in its amicus brief in [*Nicolas*], that part of the regulation is intended to include such fees as "interest" only

> when they are imposed in connection with a standard extension of credit. In *Smiley* . . . the late fees were imposed on cardholders who were borrowing under an established open-end line of credit. Both *Smiley* and §7.4001(a) allow "exportation" of such fees, to the benefit of the bank. By contrast, NSF fees on deposit accounts do not involve any "exportation" issue, they are not imposed in connection with a preexisting extension of credit, and their purpose is simply to compensate the bank for the cost of handling checks presented against insufficient funds. They are bad-check processing fees, not interest.

Clark, *supra*, at 3-48. The decision in the present case does not, therefore, conflict with the decision in *Smiley*.

B. There Is No Conflict With Any Decision By Any Court Of Appeals Or Other Court.

There are no court of appeals decisions directly on point, and all of the district court and state court decisions on point are in accord with the decision in this case. The cases cited in Video Trax's brief address a more general, and fundamentally irrelevant, proposition that "a whole line of decisions by courts throughout the country . . . have broadly recognized that flat fees, like periodic interest rates, are interest as well," or they address similarly general principles of law. None of the cases cited by Video Trax address the specific issue in this case of whether a bad check processing fee imposed on a demand account is "interest." Not one of the cases cited by Video Trax even involves an NSF/OD fee charged to a checking account, let alone discusses whether or not such a fee constitutes "interest." In fact, *all* of the cases cited

by Video Trax in support of its assertion unambiguously involve credit arrangements and fees related to such clear-cut extensions of credit. None involve a checking account, an overdraft check, or a bad check processing fee.

C. The Issue In This Case Is Essentially A Simple State Usury Law Question.

The OCC and all the courts deciding the matter have determined that bad check processing fees do not constitute "interest" under federal law. Nonetheless, as a matter of federal law, and contrary to Video Trax's implication, state law also plays a critical role in the determination of what constitutes "interest" in circumstances such as involved in the present case. The *Nicolas* court put the matter succinctly: "[Even] assuming *arguendo* the NSF fee is deemed to be interest as defined by the National Bank Act, the remedial provisions of the Act are not triggered unless the fee also violates [state] usury laws." 182 F.R.D. at 232. The *Nicolas* court premised its holding on the OCC's *amicus* submission in that case. *Id.* at 231. The OCC explained to the court that under the agency's existing rules and regulations, if a fee (such as a bad check processing fee) is not prohibited or limited by the law of the state in which a national bank is located or doing business, then the fee can be charged by the bank and does *not* constitute "interest" under the federal statute. Specifically, the OCC stated:

> In point of fact, the NSF charges in issue here – charges that are related solely to a deposit account and not at all to the lending of money or the breach of an agreement for the

> lending of money – do not constitute "interest" within the meaning of 12 U.S.C. §85. *See* 12 C.F.R. §7.4001(a). If, however, they did, Plaintiff's argument would still necessarily fail. . . . *If, as is the case with the NSF charges here, state law does not prohibit or limit the charge: (a) national banks may levy the charge, and* (b) state law determines whether or not the charge is included in the calculation which determines whether the bank has charged "interest" in excess of the limitation (if any) imposed by the state on total "interest." See 12 C.F.R. §7.4001(c).
>
> *Here, as will be shown below, Mississippi does not count the subject NSF charges in determining if a bank has charged interest in excess of the statutory maximum. Therefore, national banks need not do so either, whether or not the charges constitute "interest" under the federal statute.* This point is clearly set forth in the federal regulation. *Id.*; 61 Fed. Reg. 4,858 (1996).

OCC *Amicus* in *Nicolas* at 4-6 (underlined emphasis is in the original; emphasis in italics is added).

The OCC's position as presented to the Mississippi district court is grounded in the agency's existing rules. The OCC has itself explained that the rule (i.e., 12 C.F.R. §7.4001(a)) which it promulgated to define NSF fees and other charges as "interest" (the rule relied upon by the Supreme Court in *Smiley*) has limited application. *See* 12 C.F.R. §7.4001(c); 61 Fed. Reg. 4,849, 4,858-59 (February 9, 1996); OCC *Amicus* at 2-3. According to the OCC, its definition applies when a national bank located in one state allowing such fees or charges wants to "export" those same fees or charges for purposes of a credit transaction into another state that does not allow the fees or

charges. *Id.* As the OCC has specifically explained, however, by rule, comment, and *amicus* brief, the definition in Section 7.4001(a) does *not* apply for purposes of determining whether a particular fee or charge is to be included in a state's calculation of interest for usury purposes. *Id.* Even more specifically, the OCC has explained that if a state excludes NSF/OD fees (or late fees or other fees listed in Section 7.4001(a)) when calculating the maximum interest under its usury laws, then federal law allows national banks to charge those fees. *Id.*

The OCC's regulation contained in Section 7.4001 expressly states on its face, in subsection "(c)," that the definition contained in subsection "(a)" does not control state law usury calculations. Specifically, subsection "(c)" provides:

> (c) *Effect on state definitions of interest.* The Federal definition of the term "interest" in paragraph (a) of this section does not change how interest is defined by the individual states (nor how the state definition of interest is used) solely for purposes of state law. For example, if late fees [or NSF/OD fees] are not "interest" under state law where a national bank is located but state law permits its most favored lender to charge late fees [or NSF/OD fees], then a national bank located in that state may charge late fees [or NSF/OD fees] to its intrastate customers. . . . *[T]he late fees [or NSF/OD fees] would not be treated as interest for purposes of evaluating compliance with state usury limitations because state law excludes late fees [or NSF/OD fees] when calculating the maximum interest that lending institutions may charge under those limitations.*

12 C.F.R. §7.4001(c) (emphasis added).

In its comments published at the time Section 7.4001 was promulgated, the OCC elaborated on this formal rule that the federal definition was intended to facilitate "exportation" of fees and charges to assist national banks "with respect to interstate lending operations" but was not intended to affect state law usury calculations such as involved in this case. 61 Fed. Reg. 4,849, 4,858-59 (February 9, 1996). In fact, the OCC modified subsection "(b)" of the original version of the regulation and added subsection "(c)" in its entirety to the final version of the regulation because the OCC "received comments from Arkansas trade associations and the Arkansas congressional delegation expressing concern that the proposed Federal definition of 'interest' might be misinterpreted to require the inclusion of certain charges that are 'interest' under the Federal definition, but not so under Arkansas law, when calculating the maximum effective yield permitted by Arkansas law." *Id.* at 4,858. As the OCC explains:

> Section 7.4001(b) clarifies that, under the ruling (and 12 U.S.C. 85), one looks to state law to determine what lending charges are permitted for the most favored lender, and thus, also for national banks under 12 U.S.C. 85. *However, the Federal definition of "interest" generally does not affect state law definitions of "interest" or the manner in which state law calculates the amount of interest being charged.*

Id. (emphasis added). And as the OCC further explains:

> The final ruling addresses the concern raised by the Arkansas commentators regarding the effect of the Federal definition of interest on state law. The OCC has added to §7.4001 a new paragraph (c) that includes *a clarifying sentence*

> *confirming that the Federal definition of the term interest does not change a state's definition of interest (nor how the state definition of interest is used) solely for purposes of state law.*

Id. (emphasis added).

Florida has a statute that specifically excludes any bad check fees in certain overdraft financing arrangements from the state's definition of interest for purposes of the usury laws. Section 655.954(1), Florida Statutes, provides that "notwithstanding any other provision of law" [which includes, of course, Florida's usury law], "a financial institution shall have the power to make loans or extensions of credit to any person on a credit card *or overdraft financing arrangement* and to charge, in any billing cycle, *interest* on the outstanding amount." (Emphasis added). Section 655.954(2) defines "interest" as "those charges considered a finance charge under the federal Truth in Lending Act, 15 U.S.C. §§1601 et seq., and the associated regulations which are in effect as of June 30, 1992." TILA regulations exclude bad check processing fees, such as in this case, from the definition of "interest." Thus, Florida law excludes such fees from the computation of interest for usury purposes.

Exclusion of bad check processing fees from the definition of interest in TILA is well established. The Eleventh Circuit, for example, albeit in a different context, has identified the "associated regulations" for determining what constitutes a "finance charge" under the Truth in Lending Act (TILA): "To decide whether a particular loan . . . expense constitutes a 'finance charge' under TILA, courts must consult the statute . . . and the applicable portion of Regulation Z, 12 C.F.R. §226.4 . . .

promulgated by the Federal Reserve Board." *Johnson v. Fleet Finance, Inc.*, 4 F.3d 946, 949 (11th Cir. 1993). The regulation referenced by the Eleventh Circuit – Reg. Z – specifically *excludes* "[c]harges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and the imposition of the charge were previously agreed upon in writing." 12 C.F.R. §226.4(c)(3).

In this case, it is established beyond question that Video Trax had no agreement with NationsBank to pay all overdraft items. To the contrary, the deposit agreement between Video Trax and the bank expressly provided that the bank "is not obligated to pay an item presented if [Video Trax's] account does not contain sufficient collected funds." NationsBank, at all times, had complete discretion whether to pay or return any potential overdraft items. In fact, more often than not, the bank returned Video Trax's bad checks. On these facts, it is clear that the NSF/OD fee in this case cannot be considered interest in Florida by virtue of the provisions of Section 655.954. Under OCC regulations, this Florida law controls.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-4007

VIDEO TRAX, INC., a Florida corporation on behalf of itself and all other persons and entities similarly situated,

Plaintiff-Appellant,

v.

NATIONSBANK, N.A., a national banking association,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE OFFICE OF THE COMPTROLLER OF THE CURRENCY AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*

The Comptroller of the Currency ("Comptroller" or "OCC") is the primary regulator of the nation's federally-chartered banks. *See* 12 U.S.C. §§ 21 et seq. The Comptroller charters, regulates, and supervises approximately 2,500 national banks and 66 federal branches and agencies of foreign banks in the United States, accounting for nearly sixty percent of the nation's banking assets. Its mission is to ensure a safe, sound, and competitive national banking system that supports the citizens, communities, and economy of the United States.

In light of its mission, the Comptroller has an obvious interest in assuring that national banks are able to exercise the powers granted to them by Congress, including the power to make loans, charge interest on these loans, receive deposits, and charge fees for servicing customers' deposit accounts. The Comptroller's particular interest in this case is the proper interpretation and application of the National Bank Act, specifically, 12 U.S.C. § 85, its implementing regulation, 12 C.F.R. § 7.4001 (1999), and the interplay between the federal statutory scheme and state usury laws.

STATEMENT OF THE ISSUES

The only issue before the Court is whether the flat fee charged by NationsBank constitutes "interest" for purposes of 12 U.S.C. § 85 and 12 C.F.R. § 7.4001(a), when such fee is assessed by NationsBank whether or not it honors a check presented against insufficient funds.

STATEMENT OF THE CASE

The OCC hereby adopts, in its entirety, the Statement of the Case contained in the Appellee's Brief, filed on May 6, 1999. Appellant Video Trax, Inc. ("Video Trax") a Florida corporation, held a Simple Analysis Business Checking account at appellee NationsBank, N.A. ("NationsBank"). Under the account agreements governing the parties' obligations, Video Trax agreed in writing to pay a flat fee whenever a check written and presented for payment on the Video Trax account exceeded the account balance. There was no relation between the flat fee charged and the amount of the check, whether any

overdraft was permitted, or the duration of any such overdraft. As to each check presented when insufficient funds existed in Video Trax's account, the deposit agreements gave NationsBank the option to either honor or dishonor the check.

In those instances when NationsBank chose to honor the check, an overdraft was permitted to exist in Video Trax's account. NationsBank would charge the flat fee, designated as an "OD" fee in those instances, and assess interest against the average daily overdrawn account balance. Video Trax challenges only the flat fee, and not the interest rate charged against the average daily overdrawn account balance.

In those instances when NationsBank chose not to honor the check, it was returned unpaid. NationsBank would charge the same flat fee for a check it dishonored as for a check it honored. The only difference is that the fee for the dishonored check would be designated as a "not sufficient fund" or "NSF" fee. No overdraft would be permitted and so no overdraft interest would be charged.

SUMMARY OF ARGUMENT

The fees at issue here, whether designated as "OD" or "NSF" fees, were not usurious because they were not "interest" within the meaning of either federal or state law. They were not "interest" within the meaning of 12 U.S.C. § 85 or 12 C.F.R. § 7.4001(a) because they were charges related solely to a deposit account and not at all to the lending of money or the breach of an agreement for the lending of money. Nor were the fees "interest" under

Florida law, specifically, Fla. Stat. Ann. § 687.03(2)(b) (West Supp. 1998), pursuant to which the calculation of unlawful rates of interest "shall apply only to loans and advances of credit." Neither the OD nor NSF fees were charged for receipt of a loan or were incident to or a condition for the extension of credit. It is clear from the undisputed facts that the OD/NSF fees were bad check processing fees, not interest on extensions of credit.

ARGUMENT

Appellant contends that the OD/NSF fees in this case constitute "interest" under both federal and state law. Neither contention is correct. Imposition of an NSF fee without regard to whether NSF items are paid is not interest and does not violate the National Bank Act or Florida usury law. *See Nicholas v. Deposit Guaranty National Bank*, 182 F.R.D. 226, 231 (S.D. Miss. 1998); *Beech v. Trustmark National Bank*, No. 1:97cv187GR, slip op. (S.D. Miss. Jan. 13, 1998); 12 C.F.R. § 7.4001(a) (1999).

I. The Fees Were Not Interest Under Federal Law

The term "interest" is defined under the National Bank Act as follows:

> The term "interest" as used in 12 U.S.C. § 85 includes any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended. It includes, among other things, the following fees connected with credit extension or availability:

> numerical periodic rates, late fees, not sufficient funds (NSF) fees, overlimit fees, cash advance fees, and membership fees. . . .

12 C.F.R. § 7.4001(a). Because the fees at issue were not imposed in connection with a *credit transaction*, they were not interest as defined by the National Bank Act. *Nicholas*, 182 F.R.D. at 231. As was the case in *Nicholas*, it is clear that the fees arose from the terms of the depository agreements.

The definition of "interest" in § 7.4001(a) is intended to define "interest" for purposes of determining if a particular charge is subject to section 85. Charges that fall within the federal definition of "interest" are subject to section 85 and its "most favored lender" and exportation rules. 61 Fed. Reg. 4,858 (1996) (preamble to OCC's final rule, revising 12 C.F.R. Part 7, Interpretive Rulings). An NSF charge is "interest" subject to the statutory usury ceiling when it is assessed in connection with an *extension of credit*. Otherwise it would not meet the basic criterion of being "any payment compensating a creditor or prospective creditor for an extension of credit, making available of a line of credit, or any default or breach by a borrower of a condition upon which credit was extended." This did not happen here. The NSF/OD charges at issue here were assessed whether or not the Bank chose to honor a check drawn against insufficient funds; the NSF charge results directly from the customer's act of presenting a check for payment upon insufficient funds. In other words, the NSF charge is a direct result of the customer's action.

The fees were not compensation for an extension or line of credit because the same fee was imposed whether

or not NationsBank chose to honor Video Trax's checks presented on an account with insufficient funds. Nor were the fees compensation for "any default or breach" by Video Trax of a condition upon which credit was extended. For one thing, credit was not always extended; some of Video Trax's NSF checks were honored, others were not. *Video Trax, Inc. v. NationsBank, N.A.*, No. 97-1586-CIV-GOLD (S.D. Fla. Dec. 10, 1998), slip op. at 4.

The situation whereby an NSF charge is treated as interest under section 7.4001(a) is illustrated in OCC Interpretive Letter #817 (Jan. 7, 1998) (Attached as Exhibit 1). That letter concerned an NSF fee that the lending bank imposed when the borrower's check, presented in connection with an outstanding credit balance, bounced.

It is plain from the definition of "interest" in the first sentence of 12 C.F.R. § 7.4001(a) that the term "NSF fees," which is given as an illustrative example, was intended to cover certain fees that a national bank charges that arise out of its lending relationship with a customer, and not service fees arising out of its deposit relationship with a customer.[1] Video Trax's obligation to repay arose in connection with its failure to deposit funds and not pursuant to the "simple lending of money." *Nicholas*, 182 F.R.D. at 234, citing *First Bank v. Tony's Tortilla Factory, Inc.*, 877 S.W.2d 285, 287 (Tex. 1994).

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[1] "Interest" is defined as a "charge made to a borrower by the lender for the use of money," Charles J. Woelfel, *Encyclopedia of Banking & Finance* 608 (10th ed. 1994), and "money paid for the use of borrowed funds." G. Donald Jud & Charles J. Woelfel, *The Desktop Encyclopedia of Banking* 220 (1988). The OD/NSF fees at issue do not fit either of these definitions.

Thus, the fees at issue do not fall within the federal definition of interest set forth in 12 C.F.R. § 7.4001(a). Instead, they are addressed by a separate federal regulation, 12 C.F.R. § 7.4002 (1999), which reads as follows:

> (a) Customer charges and fees. A national bank may charge its customers non-interest charges and fees, including deposit account service charges . . .
>
> (b) Considerations. The establishment of non-interest charges and fees, and the amounts thereof, is a business decision to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. A bank reasonably establishes non-interest charges and fees if the bank considers the following factors, among others:
>
> > (1) The cost incurred by the bank, plus a profit margin, in providing the service;
> > (2) The deterrence of misuse by customers of banking services;
> > (3) The enhancement of the competitive position of the bank in accordance with the bank's marketing strategy; and
> > (4) The maintenance of the safety and soundness of the institution.
>
> (c) Interest. Charges and fees that are "interest" within the meaning of 12 U.S.C. § 85 are governed by § 7.4001 and not by this section.

As the court below held, the charges at issue here are precisely those described in 12 C.F.R. § 7.4002. *Video Trax, Inc. v. NationsBank, N.A.*, slip op. at 16.[2]

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[2] Moreover, the court below concluded that the fees "substantially satisfy the reasonableness factors set forth in 12

II. The Fees Were Not Interest Under State Law

Even assuming, *arguendo*, the NSF fee is deemed to be "interest" as defined by section 85, the remedial provisions of the Act, 12 U.S.C. § 86, are not triggered unless the fee also violates Florida usury law. *Nicholas*, 182 F.R.D. at 232. As addressed in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the National Bank Act allows a national bank to charge "interest at the rate allowed by the laws of the State . . . where the bank is located."

12 U.S.C. § 85.

As noted, the definition of "interest" in § 7.4001(a) is intended to define "interest" for purposes of determining if a particular charge is subject to section 85. Charges that fall within the federal definition of "interest" are subject to section 85 and its "most favored lender" and exportation rules. 61 Fed. Reg. 4,858 (1996). Section 7.4001(b) clarifies that one looks to state law to determine what lending charges are permitted for the most favored lender, and thus, also for national banks under section 85. However, the federal definition of interest in § 7.4001(a) generally does not affect state law definitions of "interest" or the manner in which state law calculates the amount of interest being charged. *Id.* 12 C.F.R. § 7.4001(c) (1999) illustrates this point using late fees, a type of fee included in the federal definition of interest in 12 C.F.R. § 7.4001(a), as an example.

C.F.R. § 7.4002(b)." Slip op. at 17-18. *See also Wallace v. Bank of Bartlett*, 55 F.3d 1166 (6th Cir. 1995), *cert. denied*, 516 U.S. 1047 (1996); *Nicholas*, 182 F.R.D. at 231.

> For example, if late fees are not "interest" under state law where a national bank is located but state law permits its most favored lender to charge late fees, then a national bank located in that state may charge late fees to its intrastate customers. The national bank may also charge late fees to its interstate customers because the fees are interest under the Federal definition of interest and an allowable charge under state law where the national bank is located. *However, the late fees would not be treated as interest for purposes of evaluating compliance with state usury limitations because state law excludes late fees when calculating the maximum interest that lending institutions may charge under those limitations.* (emphasis added).

A court, therefore, should look to Florida law to determine whether the OD/NSF fee falls within the framework of Florida's statutory scheme regulating finance charges and interest rates. *See Nicholas*, 182 F.R.D. at 232. As the district court ruled, applying Florida law, the OD/NSF fee charged by NationsBank for the presentment of checks against an overdrawn account is not interest for the purpose of determining whether a transaction is usurious. *Video Trax, Inc. v. NationsBank, N.A.*, No. 97-1586-CIV-GOLD (S.D. Fla. Dec. 10, 1998), slip op. at 19. Contrary to Video Trax's assertion, Florida's formula for calculating interest on loans and credit "belies the fact that [the OD/ NSF] fees are a subterfuge for excessive interest." *Id.* The rate of interest on Florida transactions is:

> alculated by first computing the advance or forbearance as a percentage of the total stated amount of such loan. . . . This percentage shall

> then be divided by the number of years, and fractions thereof, of the loan . . . according to its stated maturity date, without regard to early maturity in the event of default. The resulting annual percentage rate shall then be added to the stated annual percentage rate of interest to produce the effective rate of interest for purposes of this chapter.

Fla. Stat. Ann. § 687.03(3) (West Supp. 1998). The clear language of section 687.03(3) refers to the particular term stated on the face of a loan document. The statute explicitly states that the calculation of unlawful rates of interest "shall apply only to loans and advances of credit." Fla. Stat. Ann. § 687.03(2)(b) (West Supp. 1998). Thus, Video Trax's usury claim cannot stand unless NationsBank's fees were a charge for receiving a loan or were incident to or a condition for the extension of credit. As in *Nicholas*, it is clear that the fees were not imposed pursuant to a lending transaction. To the contrary, the fees were imposed regardless of whether or not NationsBank honored the insufficient funds checks and permitted an overdraft to exist in the account. *See Nicholas*, 182 F.R.D. at 232-33. Simply, they were fees to compensate the bank for services rendered in processing an account holder's bad checks.

CONCLUSION

For the reasons set forth in the foregoing, the OD/NSF fees were not usurious because they were not "interest." Accordingly, this Court should affirm the decision below.

CERTIFICATE OF COMPLIANCE

We hereby certify in accordance with FRAP 32(a)(7)(C) that this brief complies with the type-volume limitation specified in Rule 32(a)(7)(B). Specifically, it contains 2,573 words within the sections specified by 11th Cir. R. 28-1.

Respectfully submitted,

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EXHIBIT 1

[LOGO]

Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

January 7, 1998

Interpretive Letter #817
February 1998
12 U.S.C. 85

Dear [ ]:

This is in response to your letter of December 10, 1997, seeking clarification as to whether certain fees levied by the bank in connection with its credit card accounts constitute "interest" for purposes of 12 U.S.C. § 85 (section 85) as that term is defined in 12 C.F.R. § 7.4001(a) (section 7.4001(a)). If the fees constitute "interest" and if they are permitted by the state where the national bank is located, then section 85 provides authority to the national bank to charge those fees to borrowers who reside in another state even if that other state prohibits the imposition of a particular fee in connection with credit card loans.[1]

The fees about which you inquire are late fees and non-sufficient funds (NSF) fees imposed by the bank after

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[1] *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978). The bank about which you inquire is an intrastate bank – that is, its main office and any branch offices are located only in one state. Consequently, no issue arises about which state's interest rate law applies to loans made by an interstate national bank.

either the bank or the customer notifies the other that they are terminating credit privileges but before the outstanding credit balance is paid off. As you describe the facts, late fees are charged whenever a customer makes the minimum monthly payment after the date on which it is due and NSF fees are imposed whenever a borrower's check is presented in payment of an amount owed by the borrower to the bank and the check is returned by his or her bank.

Section 7.4001(a) specifically provides that late fees and NSF fees are considered interest for purposes of section 85 and, if permissible under the law of the state where the bank is located, may be charged without regard to the state of the residence of the borrower.[2] You are concerned, however, about the possible impact of a recent OCC letter addressing fees charged by a bank when it rejects items presented by a customer to draw against a home equity account following the termination of the account. The letter held that these fees were not "interest" for purposes of section 85 because "no debtor/creditor relationship exists at that point. . . ."[3] As that letter noted, under Regulation Z, banks may, under certain circumstances, terminate home equity lines of credit and demand repayment.[4]

---

[2] 2 C.F.R. § 7.4001(a). This regulation has been upheld by the Supreme Court in *Smiley v. Citibank (South Dakota) N.A.*, 135 L.Ed.2d 25 (1996).

[3] OCC Interpretive Letter No. 803, October 7, 1997, *reprinted in* [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,250.

[4] *Id.* at fn. 4.

However, the circumstances you describe differ in two respects. First, even after termination, the account retains an outstanding loan balance, incurred prior to termination, which the customer must repay. Second, you are not asking about fees charged in connection with impermissible new draws against the terminated account as described in Interpretive Letter No. 803, but about late fees and NSF fees charged in connection with repaying the outstanding balance that existed before termination of the account. Under these circumstances, the debtor/creditor relationship between the bank and customer remains; consequently late fees and NSF fees charged in connection with the repayment of the existing balance continue to be considered interest under sections 85 and 7.4001(a). Nothing in Interpretive Letter No. 803 compels a different conclusion.

I hope that this has been responsive to your inquiry.

Sincerely,

/s/

Julie L. Williams
Chief Counsel

CERTIFICATE OF SERVICE

This is to certify that on this 27th day of May, 1999, a copy of the Comptroller of the Currency's Motion for Leave to File a Statement of Interest as *Amici*, as well as the Brief for the Office of the Comptroller of the Currency as *Amicus Curiae*, has been served, by first class mail, on:

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Supreme Court, U.S.
FILED
JUL 26 2000
CLERK

(4)

No. 99-2000

IN THE

Supreme Court of the United States

CORRECTED COPY

VIDEO TRAX, INC.,

Petitioner,

v.

NATIONSBANK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner, Video Trax, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Further Reasons for Granting the Writ	1
I. The Eleventh Circuit's Decision Directly Conflicts With *Smiley* And Other Reported Decisions.	1
II. NationsBank Blatantly Ignores The Summary Judgment Standard.	3
III. The Process By Which An OD And NSF Check Is Processed At NationsBank Is Highly Relevant And Distinctly Different.	4
IV. NationsBank's Reliance On The OCC's Amicus Brief Is Misplaced.	6
V. Florida Law Does Not Exclude OD Fees From Usury Calculations.	8
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 3

Beech v. Trust Mark National Bank, No. 97 CV 187 GR (S.D. Miss Jan 13, 1998) 2, 4, 7

Nicolas v. Deposit Guaranty National Bank, 182 F.R.D. 226 (S.D. Miss. 1998) 2, 4, 7

Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996) 1, 2, 10

United States v. Diebold, Inc., 369 U.S. 654 (1962) 3

Statutes:

12 U.S.C. § 85 1

15 U.S.C. § 1601 9

Florida Statute § 655.954 9

Florida Statute § 655.954(1) 8

Florida Statute § 655.954(2) 9

Rule:

Fed. R. Civ. P. 56(c) 3

Other Authority:

12 C.F.R. § 7.4001 ..... 1, 2, 3, 7

FURTHER REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH *SMILEY* AND OTHER REPORTED DECISIONS.

Respondent, NationsBank, N.A., ("NationsBank") has filed its Brief in Opposition ("Brief") to Video Trax, Inc.'s ("Video Trax") Petition for Writ of Certiorari contending among other things, that the Eleventh Circuit Court of Appeal's ("Eleventh Circuit") decision in this case does not conflict with this Court's decision in *Smiley*. However, contrary to NationsBank's belief, the Eleventh Circuit's decision in this case directly conflicts with *Smiley*.

NationsBank contends that *Smiley* involved a credit card account and this case involved a checking account. (Brief at p. 18). However, as the District Court in this case correctly noted, NationsBank assumed the role of creditor by honoring OD checks when it allowed its customers to access their undisclosed, "unofficial line of credit." Thus, NationsBank's attempt to distinguish the facts of this case from *Smiley* on the basis that *Smiley* was a credit card case should be given "short shrift" by this Court, as the District Court gave NationsBank's argument on this point in its Order denying NationsBank's Motion To Dismiss.

Since this Court's decision in *Smiley*, 12 C.F.R. § 7.4001 has not been amended or modified by the OCC in any way, shape or form. 12 C.F.R. § 7.4001 is clear and unambiguous on its face. 12 C.F.R. § 7.4001 expressly provides that the term "interest," as used in 12 U.S.C. § 85,

includes any payment compensating a creditor or prospective creditor for an extension of credit. 12 C.F.R. § 7.4001 includes under its definition of interest, among other things, overlimit fees. Thus, NationsBank's imposition of an OD fee every time it allowed its customers to access their "unofficial line of credit" is clearly interest under the definition of 12 C.F.R. § 7.4001.

In an effort to bolster its position, NationsBank attempts to rely on the filing of an Amicus brief by the OCC in this case. However, the OCC's Amicus Brief suffers from the same fallacies as NationsBank's position as more fully set forth herein. The OCC has merely adopted NationsBank's legal position in its Amicus brief. Moreover, the OCC's Amicus Brief adds nothing to the process of review, as it suffers from the same failure to recognize the important factual distinctions in this case. Furthermore, the OCC's Amicus Brief fails to recognize the stunning record admissions established by Video Trax below, as compared to the factually distinguishable decisions in the *Nicolas* and *Beech* cases.

Thus, the principles of law established by this Court in *Smiley* were ignored by both the Eleventh Circuit and the District Court in this case. Moreover, the Eleventh Circuit's decision not only conflicts with this Court's decision in *Smiley*, but with opinions of numerous courts throughout the country that have held that a variety of lender imposed fees, including overlimit fees, constitute interest. Thus, this Court should accept jurisdiction and reaffirm its decision in *Smiley*.

II.

NATIONSBANK BLATANTLY IGNORES THE SUMMARY JUDGMENT STANDARD.

NationsBank has conveniently ignored the standard by which the District Court and the Eleventh Circuit were required to review the record evidence presented below. Under Rule 56(c) of the Federal Rules of Civil Procedure, the entry of summary judgment is authorized only where the pleadings and supporting materials demonstrate that there are no genuine issues of any material fact, and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("evidence of a non-moving party is to be believed and all reasonable inferences are to be drawn in their favor"); *see also, United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

When addressing a motion for summary judgment, a district court must accept the facts in the light most favorable to the non-moving party, in this case, Video Trax. Here, there were clearly factual disputes as to whether, among other things, NationsBank's imposition of an OD fee every time it allowed its customers to access their undisclosed, "unofficial line of credit" was interest under 12 C.F.R. § 7.4001. In addition, there were other factual disputes including, but not limited to, the methodology employed by NationsBank in the processing of OD checks as indicated by NationsBank in its Brief.

Moreover, not only were there material issues of fact, but the undisputed facts conclusively established that there was an undisclosed, "unofficial line of credit" established by NationsBank for its customers, whereupon by its own

admission, NationsBank would impose an OD fee every time NationsBank allowed its customers to access their "unofficial line of credit." In light of these factual disputes, the Eleventh Circuit should have taken the facts in the light most favorable to Video Trax, and conducted a *de novo* review, applying the same standard as the District Court. However, the Eleventh Circuit did not. Instead, the Eleventh Circuit simply adopted the opinion of the District Court, without reviewing the record admissions Video Trax was able to establish during the course of discovery below.

NationsBank conveniently ignores its own record admissions throughout its entire Brief as those record admissions unequivocally demonstrate that the OD fee imposed by NationsBank is a fee imposed in connection with an extension of credit. Moreover, these record admissions clearly demonstrate how this case is factually distinguishable from the decisions in *Nicolas* and *Beech*, which NationsBank attempts to rely on.

III.

THE PROCESS BY WHICH AN OD AND NSF CHECK IS PROCESSED AT NATIONSBANK IS HIGHLY RELEVANT AND DISTINCTLY DIFFERENT.

NationsBank contends that it has only one integrated bad check processing system which charges exactly the same fee for processing each and every bad check, regardless of whether it is honored or returned. (Brief at p. 6). Moreover, NationsBank contends that the functional steps for processing an NSF check, versus an OD check, are irrelevant. (Brief at p. 13). However, at NationsBank, the process by which an OD fee is assessed is distinctly different from the process

where an NSF fee is assessed, which was clearly established by Video Trax below. This functional distinction is highly relevant as it clearly established a credit determination being made by NationsBank every time the bank allowed its customers to access their "unofficial line of credit."

For example, in the deposition of Roland Rodriguez ("Rodriguez"), he testified that he generated a flow chart on the methodology by which a check is processed at NationsBank.[1] This chart distinctly shows that a credit review and credit determination is made prior to the OD fee being assessed against a customers' account. Further, Rodriguez indicated that once a check is determined not to have sufficient funds in the account to cover the amount of the instrument, it goes (if not immediately determined to be an NSF "return and charge" item) into what is known as a decision matrix. Rodriguez testified that this matrix is an automated feature utilized by NationsBank to determine if the item should be paid or not, or offers advice on whether the item should be paid or not. This matrix is a credit-scoring model that takes into account a number of factors to decide whether to extend credit to a customer. In other words, the OD fee is assessed in connection with an extension of credit, whereas an NSF fee is imposed when a decision is made by the credit-scoring matrix *not* to extend credit and "bounce" a check.

Moreover, Rodriguez testified that the "default" decision, a decision which will govern the processing of a check if no affirmative step is taken to overrule it, is then passed on to the "Vector 5" system. The functionally different

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1. This chart was identified below as NB0815 and was produced by NationsBank during the course of discovery.

process of OD versus NSF processing is also addressed in the Vector 5 manual. The Vector 5 manual, a guide used by NationsBank to process and review OD and NSF decisions, also was a part of the record below.

Importantly, Rodriguez testified that if the item is paid, then, and only then, is the OD fee assessed. In other words, the OD fee is assessed only in connection with an extension of credit. Thus, NationsBank cannot ignore the distinct difference in the processing of an OD check versus an NSF check, as clearly evidenced by the testimony of NationsBank's own witnesses. Moreover, NationsBank's attempt to demonstrate to this Court that NationsBank had one integrated processing system which charges exactly the same fee for processing every bad check, regardless of whether it is honored or returned, is clearly refuted by NationsBank's own testimony. Thus, the OD fee imposed by NationsBank when an OD check is allowed to clear, versus when a check is "bounced," is clearly a fee imposed in connection with an extension of credit.

IV.

NATIONSBANK'S RELIANCE ON THE OCC'S AMICUS BRIEF IS MISPLACED.

NationsBank attempts to lend some credence to its position that the OD fee imposed in connection with its undisclosed, "unofficial line of credit" is not interest by relying on the OCC's Amicus Brief.[2] However, as previously

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2. In a further attempt to lend credibility to its contention that the OD fee at issue in this case is not interest, NationsBank cites to (Cont'd)

mentioned, the OCC's Amicus Brief failed to recognize the important factual distinctions in this case, as opposed to the *Nicolas* and *Beech* decisions, as well as the damaging record admissions by NationsBank.

In sharp contrast to the *Nicolas* and *Beech* decisions, here, NationsBank admitted that it unilaterally established secret, undisclosed, "unofficial lines of credit" for its customers. In addition, NationsBank admitted that the OD fee is only charged *after* a credit determination is made and *only* in connection with an extension of credit. Moreover, NationsBank admitted there are no additional costs associated with the processing of OD checks.

In summary, the OCC filed its Amicus Brief in this case without reviewing the huge volume of record evidence uncovered by Video Trax in the discovery process below. Such evidence clearly supports Video Trax' position that the OD fees imposed by NationsBank were imposed in connection with an admitted extension of credit and thus, are interest under 12 C.F.R. § 7.4001. Had the OCC reviewed the discovery material uncovered below, it is highly likely that based on the distinct facts of this case and NationsBank's record admissions, the OCC would have agreed with Video

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(Cont'd)
Barkley Clark, The Law Of Bank Deposits, Collections And Credit Cards ("Clark"). However, NationsBank's reliance on Clark is misplaced as Clark was not aware of the factual distinctions in the record evidence uncovered in this case as compared to *Nicolas* and *Beech*. Moreover, Video Trax assumes Clark did not have knowledge of the fact that NationsBank established secret, undisclosed, "unofficial lines of credit" for its customers, wherein NationsBank would extend credit to its customers and allow them to overdraw their accounts.

Trax' position that the OD fee imposed by NationsBank is interest. That follows logically because the OCC contended, in its Amicus Brief, that a bank charge *is* "interest," subject to the statutory cap, if it is assessed in connection with an extension of credit.

In this case, we have, by NationsBank's own admissions, the undisputed fact that every time NationsBank allowed its customers to access their undisclosed, "unofficial line of credit" NationsBank was providing an extension of credit. That being the case, the only rational conclusion anyone, including the OCC, could have reached was that the OD fee imposed by NationsBank is interest. Thus, the OCC's Amicus brief filed in the Eleventh Circuit suffers from the same deficiencies as NationsBank's contention that the OD fee imposed in this case is not interest. Thus, the OCC's Amicus Brief should be accorded little weight, if any.

V.

FLORIDA LAW DOES NOT EXCLUDE OD FEES FROM USURY CALCULATIONS.

NationsBank also misinterprets the scope and applicability of Florida law. NationsBank contends that Florida Statute § 655.954(1) specifically excludes any bad check fees in certain overdraft financing arrangements from the State's definition of interest for purposes of the usury laws. (Brief at p. 25). However, a review of Florida Statutes, § 655.954(1) clearly demonstrates that this statutory provision applies to credit card accounts. While the text of Florida Statutes § 655.954(1) references a credit card or overdraft financing arrangement, this is all within the general parameters of a credit card account. Further, Florida Statutes

§ 655.954 is merely an enabling statute, which allows the charging of any interest on such credit card arrangements. However, nowhere within the confines of the statute, or in any other provision of Florida law, statutory or otherwise, is an OD fee excluded as interest.

Additionally, NationsBank contends that Florida Statute § 655.954(2) defines "interest" as "those charges considered a finance charge under the Federal Truth-in-Lending Act" 15 U.S.C. § 1601 ("TILA") (Brief at p. 25). Moreover, NationsBank contends that TILA regulations exclude bad check processing fees, such as the OD fee at issue in this case, from the definition of "interest," thereby concluding that Florida law excludes such fees from the computation of interest for usury purposes as well. (Brief at p. 25).

While it may be true that, under the definition of TILA, OD fees may be excluded from disclosure requirements, that does not mean that OD fees are not included in the calculation of interest for usury purposes. Thus, NationsBank's reliance on Florida Statute § 655.954 and the TILA definition of interest, is certainly misplaced.

CONCLUSION

The District Court as well as the Eleventh Circuit committed error by failing to acknowledge this Court's established legal precedent, as enunciated in *Smiley*. Accordingly, Video Trax requests that this Court accept jurisdiction of this matter, grant Video Trax' Petition for a Writ of Certiorari and reverse the decision of the Eleventh Circuit Court of Appeals, as well of the District Court, and reaffirm this Court's decision in *Smiley*.

Respectfully submitted,

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